Supreme Court, U.S.
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No. 02 94

IN THE

Supreme Court of the United States

WILLIAM OVERTON, Director of Michigan Department of Corrections; MICHIGAN DEPARTMENT OF CORRECTIONS,

Petitioners,

v.

MICHELLE BAZZETTA, et al,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1995, the Michigan Department of Corrections revised its prison visitation policy to: (1) prohibit visits by a minor child, unless the minor is the child, stepchild or grandchild of the prisoner; (2) prohibit visits by a prisoner's child when the prisoner's parental rights have been terminated; (3) require that all visiting minor children be accompanied by a parent or legal guardian; (4) prohibit visits by former inmates unless the former inmate is in the prisoner's immediate family; and (5) impose a ban on visitation for a minimum of two years for any inmate found guilty of two or more major misconducts for substance abuse. Do these restrictions, as set forth above, (a) violate a right of intimate association under the First Amendment as retained by an incarcerated felon or (b) constitute cruel and unusual punishment in violation of the Eighth Amendment?

PARTIES TO THE PROCEEDING

This case involves a seven-year-old controversy between incarcerated felons, their visitors and the Michigan Department of Corrections. Petitioners are the Michigan Department of Corrections and the Director of the Michigan Department of Corrections (MDOC).

Respondents include eleven class representatives, on behalf of themselves and all others similarly situated, including all inmates incarcerated by MDOC and non-incarcerated potential visitors of MDOC inmates. The eleven representative plaintiffs are Michelle Bazzetta, Stacey Barker, Toni Bunton, Debra King, Shante Allen, Adrienne Branaugh, Alesia Butler, Tamara Prude, Susan Fair, Valerie Bunton, and Arturo Bunton, through his next friend, Valerie Bunton.

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Petitioners respectfully petition this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on April 10, 2002. *Bazzetta v. McGinnis*, 286 F.3d 311 (6th Cir. 2002). (App. pp. 5a-23a.) The Court of Appeals affirmed the April 19, 2001 decision of the United States District Court for the Eastern District of Michigan. *Bazzetta v. McGinnis*, 148 F. Supp. 2d 813 (E.D. Mich. 2001). (App. pp. 24a-120a.)

The district court's October 6, 1995 opinion and order denying Respondent's motion for preliminary injunction is reported at *Bazzetta v. McGinnis*, 902 F. Supp. 765 (E.D. Mich. 1995). (App. pp. 160a-173a.) The April 9, 1996 opinion and order of the district court granting Petitioners' motion for summary judgment is not reported, but is reprinted in the Appendix to this petition. (App. pp. 143a-159a.)

The Court of Appeals' September 4, 1997 opinion affirming the district court's grant of summary judgment is reported at *Bazzetta v. McGinnis*, 124 F.3d 774 (6th Cir. 1997). (App. pp. 127a-142a.) On January 5, 1998, the Court of Appeals issued a supplementary opinion, which is reported at *Bazzetta v. McGinnis*, 133 F.3d 382 (6th Cir. 1998). (App. pp. 121a-126a.)

JURISDICTION

Petitioners seek review of an opinion of the United States Court of Appeals for the Sixth Circuit, which was entered on April 10, 2002. *Bazzetta v. McGinnis*, 286 F.3d 311 (6th Cir. 2002). This Court has jurisdiction to review the April 10, 2002 opinion of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. VIII provides that:

> Excessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV provides that:

> Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or

> causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

1. 1995 Revised Visitation Policy

In 1995, as a result of numerous visitation problems at MDOC facilities, including the molestation of a child during prison visitation, MDOC implemented changes in its visitation policy.[1] The revised visitation policy adopted by MDOC limited the total number of visitors that were eligible to visit each prisoner, regulated the times and dates of visits at MDOC facilities, and required that a visitor be on an approved visitor list prior to participating in visitation. *Bazzetta v. McGinnis*, 124 F.3d 774, 776 (6th Cir. 1997). In an attempt to limit the mass numbers of children entering MDOC facilities for prison visitation, the revised visitation policy limited the number of

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[1] The specific rule at issue in this case is Mich. Admin. Code R. 791.6609 and the corresponding provisions of the Director's Office Memorandum 1995-58, which have been reprinted in the Appendix to this petition. (App. pp. 174a-188a.)

minor children who could visit prisoners by requiring that these children be the child, stepchild and/or grandchild of the prisoner and requiring that all minor children be accompanied by an adult immediate family member or legal guardian. The 1995 visitation policy also denied visitation between a minor child and a prisoner when the parental rights of the prisoner had been terminated. In addition, the 1995 visitation policy limited prison visitation between current and former inmates to only those former inmates who were immediate family members of the prisoners they wished to visit. *Id.* at 776.

During the 1995 review of MDOC's visitation policy, MDOC also attempted to adopt a new form of discipline in order to combat inmate substance abuse, which had become an enormous security problem for prison administrators. *Bazzetta v. McGinnis*, 286 F.3d 311, 321 (6th Cir. 2002). The 1995 visitation policy was amended to provide that any inmates found guilty of two or more substance abuse major misconducts would lose all visitation privileges for a minimum of two years, upon approval by the Director. *Id.* at 321. Pursuant to MDOC policy, the two-year visitation restriction could not be imposed until after the inmate at issue had an opportunity to participate in a MDOC disciplinary hearing with regard to the underlying major misconduct tickets. As set forth in the Director's Office Memorandum 1995-58 (App. pp. 178a-188a), after the expiration of two years, the inmate could request reinstatement of visitation privileges; however, the request had to be approved by the Director. *Id.* at 321.

2. Visitation At MDOC Facilities

There are two types of visitation permitted at MDOC facilities, contact and non contact. Contact visits take place in a large visitation room and physical contact is permitted between the inmate and the visitor, whereas non contact visits take place in a small booth or a cubicle at the edge of the visitation room. *Bazzetta v. McGinnis*, 124 F.3d 774, 775 (6th

Cir. 1997). Prisoners incarcerated at MDOC facilities are classified from security level I through security level VI, and the most dangerous inmates are those classified at security level V and VI. With regard to security level V and VI inmates, all visitation is non contact, and it takes place in separate booths. However, inmates classified at security levels IV through I are normally allowed contact visitation. *Id.* at 775-776. Contact visitation takes place in a large room with numerous prisoners and visitors in attendance. For many MDOC facilities, especially those housing lower security level prisoners, when non contact visitation is necessary, it takes place in a cubicle located in the open visitation room. However, regardless of whether a visitor is going to participate in contact or non contact visitation, all visitors wait in the same waiting room, where they mingle with other visitors. *Id.* at 776-777.

3. The Proceedings Below

As a result of the 1995 visitation changes, Respondents filed a civil rights action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Michigan alleging that MDOC's 1995 visitation policy deprived them of their rights to privacy and family integrity, freedom of association, due process, and the right to be free of cruel and unusual punishment in violation of the First, Eighth and Fourteenth Amendments to the United States Constitution. In their complaint, Respondents sought declaratory, preliminary and permanent injunctive relief. The district court held a three day hearing on September 21, 22 and 28, 1995, which included testimony from various MDOC officials. On October 6, 1995, the district court issued an opinion and order denying Respondents' motion for preliminary injunction. *Bazzetta v. McGinnis*, 902 F. Supp. 765 (E.D. Mich. 1995).[2]

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[2] The district court determined that Respondents' claim that the visitation rule restricting visitation privileges upon an inmate being found guilty of

While Respondents' appeal of the October 6, 1995 opinion and order was pending, on December 5, 1995, Petitioners filed a motion for dismissal and/or summary judgment in which they argued that because Respondents have no constitutional rights to prison visitation as a matter of law, their complaint should be dismissed. After hearing oral argument from both parties, on April 9, 1996, the district court issued an opinion and order granting Petitioners' motion for summary judgment and entered a judgment dismissing the case.[3] Respondents' appeal to the United States Court of Appeals for the Sixth Circuit of the April 9, 1996 judgment was consolidated with their appeal of the October 6, 1995 opinion and order for the purpose of submission.

After briefing by the parties and oral argument, on September 4, 1997, the Court of Appeals affirmed the district court's April 9, 1996 opinion and order granting Petitioners' motion for summary judgment. In its decision, the Court of Appeals determined that because there is no constitutional right to prison visitation, the 1995 visitation restrictions do not violate the First, Eighth and/or Fourteenth Amendments to the United States Constitution. *Bazzetta v. McGinnis*, 124 F.3d 774 (6th Cir. 1997). Subsequently, on January 5, 1998, the Court of Appeals issued an opinion clarifying that its September 4, 1997 decision only applied to **contact** visitation. *Bazzetta v. McGinnis*, 133 F.3d 382 (6th Cir. 1998).

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two substance abuse major misconducts violated the Eighth and Fourteenth Amendments, was not ripe for decision, and therefore, it was never ruled on by the district court.

3 The April 9, 1996 opinion and order of the district court granting Petitioners' motion for summary judgment is not reported, but is reprinted in the Appendix to this petition. (App. pp. 143a-159a.)

4. The Current Appeal

On July 2, 1998, the district court granted Respondents' motion for reinstatement of their claim that the visitation rule restricting visitation privileges upon an inmate being found guilty of two substance abuse major misconducts violated the First, Eighth and Fourteenth Amendments and their claim that MDOC's 1995 visitation policy, as applied to non contact visits, violated the First and Fourteenth Amendments.[4] After Respondents conducted discovery, on May 5, 2000, Petitioners filed their second motion for summary judgment in this case. In their motion, Petitioners argued that because incarcerated felons have no constitutionally protected right to prison visitation, whether contact or non contact, the district court should dismiss Respondents' Third Amended Complaint with prejudice. The district court heard arguments from the parties on June 21, 2000, and on June 22, 2000 the district court issued an opinion and order denying Petitioners' second motion for summary judgment.

The district court held a bench trial in this case on September 7-8, September 11-15, and September 18-19, 2000. At the bench trial in this matter, Respondents called twenty-six witnesses, including many inmates and their family members, and Petitioners called eight witnesses, seven current employees of MDOC and the former director. After the end of the testimony but before the district court heard final arguments in the case, on November 17, 2000, Petitioners filed a motion to expand the record to include the prison visitation rules for all fifty states and the District of Columbia. In their motion, Petitioners argued that how other states restrict prison visitation is relevant to the issue of whether MDOC's 1995

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4 A review of the April 9, 1996 Judgment entered by the district court reveals that Defendants' motion to dismiss and/or for summary judgment was granted and the entire case was dismissed with prejudice.

visitation policy is within contemporary standards of decency as required by the Eighth Amendment. After hearing oral argument from the parties on November 28, 2000, the district court denied Petitioners' motion to expand the record.

While the parties were awaiting a decision of the district court, on April 9, 2001, Petitioners filed a motion to hold this matter in abeyance pending the outcome of an effort by the State of Michigan to amend MDOC's visitation rules. At the time of Petitioners' motion, the Michigan House of Representatives was considering a bill that would amend the MDOC's definition of immediate family to include minor siblings of prisoners, which would allow minor siblings to participate in prison visitation. The district court denied Petitioners' motion to hold this matter in abeyance on April 12, 2001.[5] On April 19, 2001 the district court issued its findings of fact and conclusions of law, wherein it determined that MDOC's 1995 visitation restrictions were unconstitutional with regard to non contact visitation and the substance abuse visitation restriction. *Bazzetta v. McGinnis*, 148 F. Supp. 2d 813 (E.D. Mich. 2001). The district court entered judgment in this case in favor of Respondents and against Petitioners as to all claims, along with interest, costs, and attorneys' fees as provided by law on April 25, 2001.

On April 27, 2001, Petitioner timely filed a notice of appeal of the April 25, 2001 judgment. After the filing of briefs by both parties and oral argument, on April 10, 2002, the Court of Appeals issued an opinion affirming the April 25, 2001 judgment of the district court adopting its April 19, 2001 findings of fact and conclusions of law in favor of Respondents as to all claims. *Bazzetta v. McGinnis*, 286 F.3d 311 (6th Cir.

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5 On May 24, 2001, Public Act 8 of 2001, which gives MDOC authority to permit the minor siblings of a inmate to participate in prison visitation, was signed into law.

2002). The April 10, 2002 Court of Appeals decision creates a constitutionally protected First Amendment right to intimate human relationships for incarcerated felons. The April 10, 2002 decision also seriously undermines MDOC's ability to manage security at state prisons by striking down, under the Eighth Amendment's prohibition against cruel and unusual punishments, the use of a permanent ban on visitation as a means of disciplining prisoners for repeated substance abuse violations and other serious misconduct. Petitioners' motion to stay the issuance of the mandate in this case was denied by the Court of Appeals on May 2, 2002, and the mandate issued the same day. This Court denied Petitioners' application for recall and stay of mandate pending certiorari by letter on May 17, 2002.[6]

REASONS FOR GRANTING THE WRIT

In its April 10, 2002 decision, the Court of Appeals determined that incarcerated felons have a constitutionally protected First Amendment right to intimate human relationships. The April 10, 2002 decision of the Court of Appeals also held that the use of a two-year visitation restriction as a punishment for repeated substance abuse violations and other serious misconduct is a violation of the Eighth Amendment's prohibition against cruel and unusual punishments. None of this Court's prior decisions recognizing a constitutionally protected First Amendment right to intimate human relationships, which were relied on by the lower

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6 Subsequent to this Court's denial of a stay of the mandate in this case, on May 16, 2002, the district court entered an order of compliance that enjoins MDOC from enforcing any rule, policy or procedure which bans, restricts, prevents or limits visitation based on prior or future misconducts for substance abuse. (App. pp. 1a-4a.)

courts,[7] address the issue of whether this right survives incarceration. In addition, this Court has never held that restricting visitation as a means of disciplining prisoners for repeated substance abuse violations and other serious misconduct constitutes cruel and unusual punishment. Thus, because the Court of Appeals April 10, 2002 decision is beyond the scope of any constitutional right heretofore recognized by this Court and is in direct conflict with all of the other circuit courts that have addressed the issue of prison visitation, Petitioners request that this Court grant certiorari.

I. THE COURT OF APPEALS' DECISION IMPERMISSIBLY EXPANDS THIS COURT'S PRIOR DECISIONS INVOLVING PRISONERS' FIRST AND EIGHTH AMENDMENT RIGHTS

1. First And Fourteenth Amendments

This Court has not yet addressed the extent to which incarcerated felons have a constitutionally protected First Amendment right to intimate human relationships. However, whenever the Court has addressed whether prisoners retain other delineated First Amendment rights, this Court has held that these First Amendment rights are fundamentally inconsistent with incarceration. In *Pell v. Pecunier*, 417 U.S. 817 (1974), the Court determined that, as long as there were other means of communication available to prisoners, incarcerated felons have no constitutionally protected First Amendment right to face-to-face interviews with members of the press. Subsequently, in *Jones v. North Carolina Prisoners' Union,* 433 U.S. 119 (1977), the Court determined that

[7] *MLB v. SLJ*, 519 U.S. 102, 116 (1996); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977); and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

prisoner labor unions do not have any associational rights protected by the First and Fourteenth Amendments. "Perhaps the most obvious of the First Amendment rights that are necessarily curtailed by confinement are those associational rights that the First Amendment protects outside of prison walls. The concept of incarceration itself entails a restriction on the freedom of inmates to associate with those outside of the penal institution." *Id.* at 125-126.[8]

During that same term in *Turner v. Safley*, 482 U.S. 78, 93 (1987), the Court upheld a prison regulation barring inmate-to-inmate correspondence. *In O'Lone v. Shabazz*, 482 U.S. 342 (1987), the Court held that prison regulations precluding certain religious services do not violate the First Amendment to the United States Constitution.[9] In addition, this Court has also noted that members of the public have no greater constitutional rights than inmates when it comes to prison regulations that affect the rights of prisoners and outsiders. *Thornburgh, supra*, at 410. Last term, in *Shaw v. Murphy*, 532 U.S. 223 (2001), the Court ruled that prisoners do not have a First Amendment right to provide legal assistance to other prisoners. "In the First Amendment context, some rights are simply inconsistent with the status of a prisoner or with the legitimate penological objectives of the correctional system." *Id.* at 229. Thus, during the past twenty-eight years, this Court has consistently upheld restrictions on the First Amendment rights of prisoners that would be unconstitutional if applied to members of the public.

[8] Recently, the Court has determined that whatever associational rights are protected by the First Amendment, they do not include a general right to associate with others. *City of Dallas v. Stanglin*, 490 U.S. 19, 24-25 (1989).

[9] *See also*: *Thornburgh v. Abbott*, 490 U.S. 401 (1989), where the Court upheld as facially valid, regulations prohibiting federal prisoners from receiving publications found to be detrimental to institutional security.

With regard to the issue of visitation with family, this Court has upheld the right of jail officials to restrict the exercise of the First Amendment right to intimate human relationships by pretrial detainees. In *Block v. Rutherford*, 468 U.S. 576 (1984), the Court held that a blanket prohibition on contact visits for pretrial detainees was not unconstitutional.

> Contact visits invite a host of security problems. They open the institution to the introduction of drugs, weapons, and other contraband. Visitors can easily conceal guns, knives, drugs, or other contraband in countless ways and pass them to an inmate unnoticed by even the most vigilant observers. And these items can readily be slipped from the clothing of an innocent child, or transferred by other visitors permitted close contact with inmates. [*Id.* at 586.]

Although this Court acknowledged that there might be other alternatives to address the security issue, prison administrators are not constitutionally required to use the least restrictive means available in order to achieve the legitimate governmental objective. "In sum, we conclude that petitioners' blanket prohibition is an entirely reasonable, non-punitive response to the legitimate security concerns identified, consistent with the Fourteenth Amendment." *Id.* at 588. *See also: Bell v. Wolfish*, 441 U.S. 520 (1979).

In *Ky. Dept. Of Corrections v. Thompson*, 490 U.S. 454 (1989), the Court upheld prison regulations that prohibited certain persons from visiting with incarcerated felons, determining that there is no Fourteenth Amendment right to unfettered prison visitation.

> Respondents do not argue - nor can it seriously be contended, in light of our prior cases - that an inmate's interest in unfettered visitation is guaranteed directly by the Due Process Clause. We have rejected the

> notion that "any change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protections of the Due Process Clause." * * * The denial of prison access to a particular visitor "is well within the terms of confinement ordinarily contemplated by a prison sentence," *Hewitt v. Helms*, 459 US at 468, 74 L Ed 2d. 675, 103 S Ct 864, and therefore is not independently protected by the Due Process Clause. [*Id.* at 460-461.]

Previously in *Olim v. Wakenekona*, 461 U.S. 238 (1983), this Court held that the transfer of a state prisoner from Hawaii to California did not violate the Due Process Clause of the Fourteenth Amendment.

> Respondent's argument to the contrary is unpersuasive. The Court in *Montanye [v. Haymes*, 427 U.S. 236 (1976)] took note that among the hardships that may result from a prison transfer are separation of the inmate from home and family, separation from inmate friends, placement in a new and possibly hostile environment, difficulty in making contact with counsel, and interruption of educational and rehabilitative programs. [Citation omitted.] These are the same hardships respondent faces as a result of his transfer from Hawaii to California. [*Id.* at 248, n.9.]

To the extent that this Court has addressed the issue of whether the First Amendment and/or Fourteenth Amendment protects a fundamental right to family integrity, that constitutional right has been limited to grandparents, parents, children and grandchildren. In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), the Court ruled that a housing ordinance limiting occupancy to members of a single nuclear family violated the Due Process Clause of the Fourteenth

Amendment as applied to a grandmother's choice to live with her grandson.

> On its face it selects certain categories of relatives who may live together and declares that others may not. In particular, it makes a crime of a grandmother's choice to live with her grandson in circumstances like those presented here. * * * "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." [*Id.* at 498-499.]

More recently, in *Troxel v. Grandville*, 530 U.S. 57 (2000), the Court refused to extend the constitutionally protected rights in matters of marriage and family life to any relationship beyond that of parents and children. Thus, whatever the extent of the First Amendment right to intimate human relationships and/or family integrity, none of this Court's prior cases addressing the nature and extent of this right involve incarcerated felons.

2. Eighth And Fourteenth Amendments

In *Estelle v. Gamble*, 429 U.S. 97 (1976), this Court set forth the test for determining whether conditions of confinement in general may result in a violation of the Eighth Amendment's prohibition against cruel and unusual punishment. "The Amendment embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency, . . . against which we must evaluate penal measures. Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society." *Id.* at 102. Subsequently, in *Rhodes v. Chapman*, 452 U.S. 337 (1981), the Court clarified that not all harsh conditions of confinement violate the Eighth Amendment, but

rather, the courts should look at whether the deprivation at issue is sufficiently serious.

> No static "test" can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." * * * But conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society. [*Id.* at 346-347.]

Recently, in *Wilson v. Seiter*, 501 U.S. 294 (1991), the Court identified the types of deprivations that may involve an Eighth Amendment violation.

> Some conditions of confinement may establish an Eighth Amendment violation in combination when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise - for example, a low cell temperature at night combined with a failure to issue blankets. [*Id.* at 304.]

See, Sandin v. Conner, 515 U.S. 472 (1995).

> The punishment of incarcerated prisoners, on the other hand, serves different aims than those found invalid in *Bell* and *Ingraham*. The process does not impose retribution in lieu of a valid conviction, nor does it maintain physical control over free citizens forced by law to subject themselves to state control over the educational mission. It effectuates prison

> management and prisoner rehabilitation goals. * * * Discipline by prison officials in response to a wide range of misconduct falls within the expected perimeters of the sentenced imposed by a court of law. [*Id.* at 485.]

In the instant case, the Court of Appeals determined that pursuant to the First, Eighth and Fourteenth Amendments, prisoners have a constitutionally protected right of intimate human relationships, and depriving prisoners of visitation is cruel and unusual punishment. As support for this conclusion, the Court of Appeals relied on the concurring opinion of Justice Kennedy in *Ky. Dept. of Corrections v. Thompson*, *supra*, at 465. *Bazzetta v. McGinnis*, 286 F.3d 311, 317 (6th Cir. 2002). A review of the *Thompson* case, however, reveals that it actually supports Petitioners' position that incarcerated felons have no constitutionally protected right to visitation. As set forth above, in *Thompson*, the Court refused to find that prisoners have a Fourteenth Amendment right to participate in visitation. *Id.* at 461.

The Court of Appeals also relied on numerous Supreme Court cases that have upheld a First Amendment right to establish and maintain family relationships and to make childrearing decisions, as support for its determination that prison visitation is a constitutionally protected right. *Id.* at 317. However, none of the cases relied on by the Court of Appeals involve incarcerated felons, and this Court has never held that the First Amendment right to establish and maintain family relationships and to make childrearing decisions survives incarceration.

With regard to its determination that depriving prisoners of visitation is cruel and unusual punishment, a review of the cases relied on by the Court of Appeals reveals that none of these cases involve prison visitation. Therefore, given that this Court has never held that depriving an inmate of prison

visitation for a minimum of two years constitutes cruel and unusual punishment, the Court of Appeals' determination that use of a two-year visitation restriction as a punishment for repeated substance abuse violations and other serious misconduct violates the Eighth Amendment, is erroneous.

II. THE SIXTH CIRCUIT COURT OF APPEALS' DECISION CONFLICTS WITH THE OTHER CIRCUITS THAT HAVE ADDRESSED THE ISSUE

All of the other circuit courts that have looked at the issue of whether incarcerated felons have a constitutionally protected right to intimate human relationships, have ruled that the right to intimate association as protected by the First and Fourteenth Amendments does not survive incarceration. Recently, in *Gerber v. Hickman*, No. 00-16494, 2002 U.S. App.. LEXIS 9749 (9th Cir. May 23, 2002), the Ninth Circuit was confronted with the issue of whether a prisoner has a constitutional right to procreate while incarcerated. Although the Ninth Circuit acknowledged that the right to procreate is a protected part of the First Amendment right to intimate human relationships, it held that the right does not survive incarceration. Thus, because the Ninth Circuit determined that the loss of the right to intimate association was part and parcel of being imprisoned for conviction of a crime, the Court never addressed whether the prison's regulation was related to a valid penological interest. *Id.* at *6-7, 13.

In *Thorne v. Jones*, 765 F.2d 1270 (5th Cir. 1985), the Fifth Circuit refused to find that inmates have a right to visitation grounded in the First Amendment.

> Such incarcerated persons as the Thorne brothers maintain no right to simple physical association -- with their parents or with anyone else -- grounded in the first amendment. * * * At all events, the claims

> of the Thorne brothers, whatever their source, to go where they like and to meet with whom they choose have been terminated by a proceeding conducted according to the strictest of due process: a criminal trial. [*Id.* at 1274.]

See also: *Berry v. Brady*, 192 F.3d 504 (5th Cir. 1999), "Berry has no constitutional right to visitation privileges." *Id.* at 508; *Lynott v. Henderson*, 610 F.2d 340 (5th Cir. 1980); and *McCray v. Sullivan*, 509 F.2d 1332 (5th Cir. 1975).

Although only one circuit court has addressed the issue of whether a denial of prison visitation is cruel and unusual punishment, none of the circuit courts addressing the issue of prison visitation in general have found that a denial of visitation is a violation of the Eighth Amendment.

In *Berry, supra,* the Fifth Circuit refused to find that a denial of visitation deprived a prisoner of the minimal measure of life's necessities such that it violated the Eighth Amendment. *Id.* at 507. Previously, in *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), the Tenth Circuit upheld visitation regulations limiting visitors to an inmate's immediate family, or up to three non-family visitors. *See also*: *Peterson v. Shanks*, 149 F.3d 1140 (10th Cir. 1998). "Prison necessarily disrupts the normal pattern of familial association, so lawful imprisonment can hardly be thought a deprivation of the *right* of relatives to associate with the imprisoned criminal." *Mayo v. Lane*, 867 F.2d 374, 375 (7th Cir. 1989).

The Second Circuit has also upheld visitation restrictions that limited prison visitation to non-contact visits with members of an inmate's immediate family, but prohibited visitation with friends or other members of the public.

> Considering the alternative means of communication that were available to appellant through those persons

> with whom he could visit and the justifications put forth by prison officials. we conclude that the restrictions on Smith's visiting rights did not violate the First Amendment. [*Smith v. Coughlin*, 748 F.2d 783, 788 (2nd Cir. 1984).]

In *White v. Keller*, 588 F.2d 913 (4th Cir. 1978), the Fourth Circuit affirmed a district court ruling that there is no constitutional right to prison visitation either for prisoners or visitors. More recently, the Eleventh Circuit upheld the denial of visitation for **two years** to an inmate and his visitor who misled prison authorities about their relationship. *Caraballo-Sandoval v. Honsted*, 35 F.3d 521 (11th Cir. 1994).

In its April 10, 2002 decision, the Court of Appeals does not cite any other circuit court decision to support its conclusion that inmates have a constitutionally protected right to prison visitation. Although the Court of Appeals refers to *Thorne v. Jones, supra,* generally, as explained above, in *Thorne v. Jones*, the Fifth Circuit held that inmates have no right to prison visitation that is protected by the United States Constitution. In addition, the Court of Appeals does not cite any circuit court cases to support its determination that the denial of prison visitation constitutes cruel and unusual punishment.

Given that the April 10, 2002 decision of the Court of Appeals conflicts with every other circuit court that has addressed the issues of whether incarcerated felons have a constitutionally protected First Amendment right to intimate human relationships, and whether the use of a two-year visitation restriction as a punishment for repeated substance abuse violations violates the Eighth Amendment's prohibition against cruel and unusual punishment, Petitioners request that this Court grant certiorari and reverse the Court of Appeals' April 10, 2002 decision.

CONCLUSION

For all of the above-stated reasons, Petitioners, the Michigan Department of Corrections and its Director, respectfully request this honorable Court to grant Certiorari and reverse the April 10, 2002 decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted.

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Dated: July, 2002

APPENDIX

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Michelle Bazzetta, Stacy Barker, Toni Bunton, Debra King, Shante Allen, Adrienne Bronaugh, Alesia Butler, Tamara Prude, Susan Fair, Valerie Bunton and Arturo Zavala, through his Next Friend Valerie Bunton, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

No. 95-73540
Hon. Nancy G. Edmunds

Kenneth McGinnis, Director of Michigan Dep't of Corrections, Dan Bolden, Deputy Director of the Correctional Facilities, Michigan Dep't of Corrections,

Defendants.

ORDER OF COMPLIANCE

This Court having ruled that the Michigan Department of Corrections' rules, policies and procedures, restricting non-contact visits from minor nieces, nephews, siblings, biological children of prisoners whose parents voluntarily terminated their parental rights (other than for abuse or neglect), minors who are accompanied by adults with power of attorney, and former prisoners, and imposing a ban on visits for substance abuse misconducts, violate Plaintiffs' constitutional rights protected

by the First, Eighth, and Fourteenth Amendments to the Constitution and this ruling having been affirmed in its entirety by the Sixth Circuit Court of Appeals, and the mandate having issued on May 2, 2002,

IT IS HEREBY ORDERED that Defendants' are enjoined from enforcing Rule 791.6609 (11)(d), PD 05.03.140 (BBB) (4) or any rule, policy or procedure which bans, restricts, prevents or limits visitation based on prior or future misconducts for substance abuse;

IT IS FURTHER ORDERED that Defendants shall take all steps to remove all restrictions on visitation imposed as a result of two or more guilty findings for substance abuse misconducts on or before the end of business on May 17, 2002. Defendants shall notify all facilities of the lifting of the ban on visitation imposed on prisoners who were found guilty of two or more substance abuse misconducts, or reimposed for a subsequent substance abuse misconduct, posting a notice by the end of business on Friday, May 17, 2002 and shall post a notice at each facility advising Plaintiffs that visitation shall recommence on Saturday, May 18, 2002;

IT IS FURTHER ORDERED that Defendants shall prepare a revised visitor application form which deletes the restrictions for minor nieces, nephews, biological children of prisoners whose parents voluntarily terminated their parental rights (other than for abuse or neglect), minors who are accompanied by adults with power of attorney, and former prisoners, and provide copies of the revised form to all facilities on or before the end of business May 20, 2002. Sufficient application forms shall be available for distribution to any prisoner requesting a form and notice shall be prominently posted at all facilities to advise plaintiffs of the availability of the revised forms. The department shall facilitate the mailing of all forms, including the provision of postage for

indigent prisoners in the same manner as currently used for the processing of legal mail, and forms shall be available for visitors at the front desk.

IT IS FURTHER ORDERED that Defendants shall allow changes in prisoners visiting forms during the thirty days following the availability of the revised forms, and shall promptly process the completed application forms within one week from receipt of the completed application and shall advise applicants of the availability or denial of visits within two days of the completion of the review process. Defendants shall provide notice to Plaintiffs' counsel of all denials of visitation applications, by providing a copy of the application and the decision and basis for the denial;

IT IS FURTHER ORDERED that Defendants are enjoined from denying visits by minor nieces, nephews, biological children of prisoners whose parents voluntarily terminated their parental rights (other than for abuse or neglect), children brought for visits by adults with power of attorney, and former prisoners based on any and all rules policies and procedures that were found to be unconstitutional by this court's opinion of April 10, 2001;

IT IS FURTHER ORDERED that the visits may take place on either a contact or non contact basis. If Defendants choose to have the visits non contact, the visits shall be in accordance with the number of visits, number of visitors, frequency and length allowed each prisoner according to their custody level and location;

IT IS FURTHER ORDERED that the injunction enforcing Rule 791.6609(11)(d) applies to contact as well as non-contact visitation, and Defendants may not impose a non-contact restriction on the reinstatement of visits unless such restriction is otherwise authorized by

Department regulations.

IT IS FURTHER ORDERED that Defendants provide a copy of all implementing forms, memos, reports on denials, grievances on visitation related to these rules, together with all reports on compliance.

/s/
Nancy G. Edmunds
U.S. District Judge

Dated: May 16, 2002

Filed: May 16, 2002

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Michelle Bazzetta, Stacy Barker, Toni Bunton, Debra King, Shante Allen, Adrienne Branaugh, Alesia Butler, Tamara Prude, Susan Fair, Valerie Bunton, and Arturo Bunton, through his next friend Valerie Bunton, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v. No. 01-1635

Kenneth McGinnis,
Director of Michigan Department of Corrections, and Michigan Department of Corrections,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 95-73540--Nancy G. Edmunds, District Judge.
Argued: November 30, 2001
Decided and Filed: April 10, 2002

Before: MERRITT, CLAY, and GILMAN, Circuit Judges.

COUNSEL

ARGUED: Lisa C. Ward, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS DIVISION, Lansing, Michigan, for Appellant. Deborah A. LaBelle, LAW OFFICES OF DEBORAH LaBELLE, Ann Arbor, Michigan, for Appellee. ON BRIEF: Lisa C. Ward, Leo H. Friedman, Mark W. Matus, OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, for Appellant. Deborah A. LaBelle, LAW OFFICES OF DEBORAH LaBELLE, Ann Arbor, Michigan, Patricia A. Streeter, Detroit, Michigan, for Appellee. Jill M. Wheaton, DYKEMA GOSSETT, Detroit, Michigan, Michael J. Steinberg, Kary L. Moss, AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN, Detroit, Michigan, for Amici Curiae.

OPINION

MERRITT, Circuit Judge. Plaintiffs, a class of prisoners incarcerated by defendant Michigan Department of Corrections, and their prospective visitors, sue the department under 42 U.S.C. § 1983, claiming that restrictions on prison visitation imposed in 1995 violate their rights under the First, Eighth, and Fourteenth Amendments.

In 1995, Michigan's Department of Corrections issued new regulations limiting who can visit prisoners. The regulations challenged by plaintiffs (1) banned visits from prisoners' minor brothers, sisters, nieces and nephews; (2) banned all visits by prisoners' children when parental rights had been terminated; (3) banned all visits by former prisoners who are not immediate family; (4) required that visiting children be accompanied by a parent or legal guardian, and (5) permanently banned visitors, apart from attorneys and clergy,

for prisoners who twice violated the department's drug abuse policies.

The new regulations were a response to growth in Michigan's prison population in the early 1990s and the resulting increase in the number of visitors. Department officials believed the increase in visitors made supervising visits more difficult and smuggling of drugs and weapons more difficult to stop. Officials also decided that the increased number of visiting children was a problem because it was difficult for prison guards to supervise children and because the prison environment was bad for the children. We note that there are two kinds of visits, contact and non-contact. Contact visits allow physical contact between a prisoner and visitors, and occur in meeting rooms supervised by prison guards. Non-contact visits occur when a prisoner and visitors sit in separate rooms, but can see one another through a clear window and speak on a telephone. J.A. at 2506-51.

In 1995, plaintiffs challenged the new regulations, asserting they violated plaintiffs' First, Eighth, and Fourteenth Amendment rights. The department defended the constitutionality of the regulations, arguing they were only applied to contact visits, to which prisoners have no absolute right. The district court found plaintiffs' challenge to the permanent ban on visitors for substance abuse violations was not ripe, but upheld the other regulations as they applied to contact visits. See *Bazzetta v. McGinnis*, 902 F. Supp. 765 (E.D. Mich. 1990). We affirmed its decision, holding that "there is no inherent, absolute right to contact visits with prisoners," *Bazzetta v. McGinnis*, 124 F.3d 774, 779 (6th Cir. 1997) (emphasis added), but we did not address whether prisoners have a right to non-contact visits. See *Bazzetta v. McGinnis*, 133 F.3d 382, 383 (6th Cir. 1998). Subsequently it turned out that the department seriously misled us and was applying the regulations to all visits, contact and non-contact.

Plaintiffs again brought suit challenging the regulations, this time as applied to non-contact visits. All of the regulations in question apply to non-contact visitors who communicate with prisoners by phone and view them through glass walls.

After a bench trial, the district court found for the plaintiffs. See *Bazzetta v. McGinnis*, 148 F. Supp. 2d 813 (E.D. Mich. 2001). It held that the regulations limiting visits infringed on prisoners' First Amendment right of intimate association and were not reasonably related to a valid penological objective, and that the permanent ban on visitors for two violations of the drug abuse policy infringed on prisoners' First Amendment right of intimate association, was not reasonably related to a valid penological objective, was cruel and unusual punishment in violation of the Eighth Amendment, and was imposed in a manner violating prisoners' Fourteenth Amendment due process rights. Defendants timely appealed.

Analysis

A. Prisoners' rights and legitimate restrictions

"Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner v. Safley*, 482 U.S. 78, 84 (1987). "A prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the correctional system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974); accord *Shaw v. Murphy*, 532 U.S. 223, 228 (2001) ("incarceration does not divest prisoners of all constitutional protections").

The First Amendment guarantees individuals the right to freedom of association, and prisoners retain their First Amendment rights to the extent that the rights do not conflict with their status as prisoners and the legitimate demands of the

prison system. *See Pell*, 417 U.S. at 822. Until now, this Court has not addressed whether prisoners retain the right to freedom of association. *See Long v. Norris*, 929 F.2d 1111, 1118 (6th Cir. 1991) ("In the Sixth Circuit we have not decided the degree to which prison inmates retain their freedom of association"). This question is squarely before us now. For plaintiffs to make out their claim under § 1983, they must retain some right to freedom of association, contrary to defendants' assertion that there are no such rights.

We hold that prisoners do retain a limited right to freedom of association--specifically non-contact visits with intimate associates--even while incarcerated. This follows clearly from *Pell*, where the Supreme Court held that a prisoner retains a First Amendment right unless it is incompatible with incarceration. *See* 417 U.S. 822. Imprisonment does sharply limit inmates' right of association. For instance, prisoners who pose a security risk have no right to remain in the general prison population, *see Hewitt v. Helms*, 459 U.S. 460, 468 (1983) (holding temporary, nonpunitive transfer to administrative segregation does not violate a prisoner's constitutional rights), and prisoners have no constitutional right to contact visits, *see Bazzetta*, 133 F.3d at 383 (holding prisoners have no constitutional right to contact visits); *accord Thorne v. Jones*, 765 F.2d 1270, 1274 (5th Cir. 1985) (holding incarcerated individuals maintain no right to physical association). But the right of association is not wholly extinguished by imprisonment.

In support of its claim that inmates retain no right of association, the department cites Supreme Court cases which hold that prisoners do not have a right to unfettered or contact visits. *See, e.g., Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460 (1989) (inmates have no right to "unfettered visitation"); *Jones v. North Carolina Prisoners' Labor Union Inc.*, 433 U.S. 119, 125 (1977) (upholding ban on inmate union

organizing and group meetings); *Pell*, 417 U.S. at 826 (upholding ban on visits by journalists). None of these cases, however, say that prisoners have no right to visitation, and several caution that they should not be read to reach such a conclusion. In *Thompson*, the Court warned that "[n]othing in the court's opinion forecloses a claim that a prison regulation permanently forbidding all visits to some or all prisoners implicates the protections of the due process clause in a way that the precise and individualized restrictions" at issue there do not. 490 U.S. at 465 (Kennedy, J. concurring). In *Pell*, the Court upheld a ban on visits from journalists, but noted that the regulation was permissible in part because prisoners retained "an unrestricted opportunity to communicate with the press or any other member of the public through their families, friends, clergy, or attorneys who are permitted to visit them at the prison." 417 U.S. at 825. Far from holding that prisoners had no right to visits, the *Pell* Court analyzed the new restrictions before upholding them, and stated that it would not defer to prison officials when there was "substantial evidence in the record to indicate that the officials [had] exaggerated their response" to a problem. *Id.* at 827. Close analysis is especially appropriate when, as is the case here, the challenged restrictions interfere with family relationships, including the parent-child bond, specially protected by the Constitution. *See, e.g.*, M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) ("Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as of basic importance to our society, rights sheltered against the State's unwarranted usurpation, disregard, or disrespect" (internal citations omitted)); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (there is a "private realm of family life which the state cannot enter" (citation omitted)); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) (parents have the liberty to "direct the upbringing and education" of their children).

The fact that a prison regulation interferes with a constitutional right does not mean it will be struck down. In most situations, when evaluating such a regulation, federal courts will defer to state prison officials' reasoned judgment that the regulation is necessary and appropriate.

> [T]he problems of prisons in America are complex and intractable, and . . . they are not readily susceptible of resolution by decree. Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources. . . . Prison administration is, moreover, a task that has been committed to the responsibility of [the legislative and executive] branches, and separation of powers concerns counsel a policy of judicial restraint.

Turner, 482 U.S. at 84-85. In *Turner v. Safley*, the Supreme Court laid down a deferential test for evaluating such regulations: "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to a legitimate penological interest." *Id.* at 89. In applying this broad standard, we ask a series of questions: whether there is a valid connection between the regulation and a penological interest; whether prisoners retain an alternative means of exercising the right; whether assertion of the right will have a significant effect on guards and other inmates; and whether prisoner officials have ready alternatives to the infringing regulation. *See id.* at 89-90. "As long as prison authorities present evidence to support their judgment that prison security will be undermined in the absence of a challenged regulation, we will not substitute our judgment for theirs." *Brown v. Johnson*, 743 F.2d 408, 412-13 (6th Cir. 1984).

B. The Department's Restrictions on Visitors

Plaintiffs ask us to strike down the regulations if we find they significantly infringe visitors' First Amendment rights. The Supreme Court has made clear, however, that such an approach would unreasonably constrain the corrections system. We therefore analyze the regulations solely as they infringe on prisoners' rights. *See Thornburgh v. Abbott*, 490 U.S. 401, 410 n.9 (1989) (heightened scrutiny is not appropriate even in circumstances where a prison regulation affects rights of both prisoners and outsiders).

1. Minor brothers, sisters, nieces, and nephews.--The first challenged regulation forbids visits from a minor child "unless he or she be the child, stepchild, or grandchild of the prisoner or an emancipated minor." Mich. Admin. Code § 791.6609(2). n1 Plaintiffs challenge this ban to the extent it prevents visits from prisoners' siblings, nieces, and nephews.

n1 After the district court handed down its opinion, Michigan moved to change its policy and allow visits from minor siblings. Appellant's Br. at 7. As Michigan did not make this change until after the district court handed down its opinion, however, and because it still defends its right to impose this or any other restriction on visits, we address the regulation here.

At trial, the department claimed this restriction was needed to reduce the number of visitors to manageable levels, to stop smuggling, and to protect children from exposure to the prison environment. On appeal, the department does not offer a specific defense of this particular regulation or the other regulations, instead it asks this court to hold there is no right to visitation, or alternatively simply to defer to its judgment that the measures are necessary to ensure prison safety. For the sake

of thoroughness, we address claims made by the department at trial.

First, the department claimed the regulation was necessary to reduce the number of visitors, who it said were overwhelming prison facilities. Department officials hoped the new regulations would reduce visits by 10-15%, at which point they apparently believed visits would again be manageable. After the new regulations were passed, the department's figures show, visits fell by half. See *Bazzetta*, 148 F. Supp. 2d at 820-21. Like District Judge Edmunds, we view the banning of visits from minor sisters, brothers, nieces, and nephews as an exaggerated response to perceived problems in prison visitation. The record shows that, when the defendants implemented the new regulations, they had no idea how many visitors would be affected by them, or what the effect would be on visitors and inmates. *See id.* at 821. In light of these facts, the regulations appear as attempts not to manage visits but to end them. Had prison officials merely wished to reduce the number of visiting children, they had at hand less stringent alternatives, including banning visits from unrelated children, which would have reduced visitors without straining close family ties.

The department also claims that the new regulations are required to stop smuggling and to protect would-be child visitors. It offers no data or expert testimony to support these claims, relying instead on prison officials' "vast experience" to justify the restrictions. Appellant's Br. at 10. As the district court pointed out, non-contact visits prevent both smuggling by, and possible assaults on, child visitors. Prison officials also stated that they opposed allowing children to visit because visiting would cause the children to become "too comfortable" with prisons and, we presume, lead them to a life of crime. *See Bazzetta*, 148 F. Supp. 2d at 824. This determination is for parents to make, not prison officials. Prison officials do not

stand in *loco parentis* for visiting children; and the desire to make children frightened of prison, or of relatives in prison, has little to do with maintaining prison safety, the stated objectives of the regulations.

The department also defended the regulations by arguing that letters and phone calls are adequate alternatives to visits for inmates who wish to keep in touch with minor relations. That is not the case. At trial, unchallenged expert testimony showed that 40 to 80% of inmates are functionally illiterate, unable to compose a letter. Phone calls are also unsatisfactory. They are monitored by department staff and terminated after a few minutes. *See id.* at 818 n.2.

While the department offered no clear benefits to be gained from excluding prisoners' minor siblings, nieces, and nephews, plaintiffs offered over a dozen witnesses who testified to the myriad of ways the restrictions on minor visitors disrupted family relationships, particularly where prisoners had performed parental duties for their siblings, nieces, or nephews. *See id.* at 829-30.

For the above reasons, we find that the department's prohibition on non-contact visits from inmates' minor siblings, nieces, and nephews is not reasonable related to a legitimate penological goal. The district court's decision is affirmed.

2. When parental rights are terminated.--The second challenged regulation forbids a prisoner's natural child from visiting if "[t]he parental rights of the prisoner to the child have been terminated." Mich. Admin. Code § 791.6609(6)(a). Plaintiffs challenge this regulation only as it has been applied to visits from children whose parents have voluntarily surrendered their parental rights so a child could be placed for adoption; they do not, presumably, challenge the ban on visits

from children when the parents' rights were terminated for abuse or neglect. Plaintiffs' Br. at 35.

The department offers no specific reason why it decided to ban visits from these children, except its general desire to reduce the number of visitors and protect children. We have already stated why these reasons are not sufficient to ban visits from minor siblings, nieces and nephews. For identical reasons, we hold these reasons are also not sufficient to block visits from an inmate's child, when the inmate has voluntarily surrendered parental rights in the child's best interests. As the district court noted, in such situations "contact between parent and child is an important ongoing need for both parent and child." *Bazzetta*, 148 F. Supp. 2d at 832. In one instance, the department's policy prevented a therapist-recommended and court-ordered visit from a child recently placed for adoption, threatening the child's well-being. J.A. at 2763-68. A ban on such visits is not reasonably related to a legitimate penological interest. We affirm the district court's decision.

3. Former prisoners.--The third challenged regulation bans visits from "a prisoner, a former prisoner, a probationer, or a parolee" other than a prisoner's immediate family. Mich. Admin. Code § 791.6609(7). This regulation is intended to prevent "illegal or disruptive activity occasioned by such visits." *Bazzetta*, 148 F. Supp. 2d at 832. Like the other challenged regulations, this had significant unintended consequences. In many instances, "exclusion of former prisoners creates significant hardship on friends and family, including instances where former prisoners have been completely rehabilitated and have served as social workers or governmental ombudsmen." *Id.* In one instance, a child was not allowed to visit to her imprisoned mother because the only adult available to bring her was the child's father, who was not married to the mother (and so not "immediate family") and

who had been convicted of a crime 23 years before. J.A. 5713-15.

It is a closer call whether this regulation is reasonably related to a legitimate penological objective. The asserted goal, the prevention of disruption by ex-convicts, is a legitimate penological objective. A blanket ban on all noncontact visits by former inmates is, however, an exaggerated response to the problem raised by visits with ex-convicts. It prevents visitors with legitimate reasons for seeing prisoners, such as social workers, from doing so. The department has at hand a ready alternative for weeding out disruptive visitors: all visitors must pass a department screening procedure before getting permission to visit. This gives department officials an opportunity to stop would-be troublemakers. We also observe that the department has no working procedures for making reasonable exceptions to this ban. While department regulations state a warden can grant a waiver of the ban when it is in the best interests of the prisoner, see Mich. Admin. Code § 791.6609(3), in practice some wardens appear to refuse to grant any waivers. *See* J.A. 5713-15. We find that such an inflexible ban on former prisoners is not reasonably related to a legitimate penological objective, and uphold the district court's decision.

4. Children must be accompanied by immediate family or legal guardian.--The fourth challenged regulation requires that children who do visit be accompanied by an immediate family member or legal guardian. Mich. Admin. Code § 791.6609(5). Before 1995, children were also allowed to visit when accompanied by an adult with a valid power of attorney. Plaintiffs argue that this was sufficient to guarantee a child's safety, and ask that the status quo ante be restored. Prison officials submitted no reasons for changing the policy, except their wish to reduce the overall number of visitors and protect children. A few officials did voice concerns that a power of

attorney could be forged, but they did not cite a single instance where such a forgery had occurred in the past, nor were they able to explain why someone would wish to commit such a forgery. *See id.* at 833.

The justification for this policy is weak, but the harm done is readily apparent. As the district court found, "unrefuted evidence submitted by plaintiffs . . . [showed that] many prisoners, especially women, do not have another immediate family member available to bring their child to visit," and instituting a guardianship for the children involved a "complex legal . . . procedure" beyond the resources of many prisoners. *Id.* The ban on visits from children unaccompanied by a guardian or immediate family member is thus for many prisoners a ban on visits from their children. The department has produced no credible penological objective to be met by such a cruel policy. We uphold the district court's decision.

C. The Two-strikes ban for substance abuse

The department also issued a regulation imposing a *"[p]ermanent* ban [on] all visitation (other than attorneys or clergy) for prisoners with two or more major misconduct charges of substance abuse." Mich. Admin. Code. § 791.6609(11) (emphasis added). The regulation was part of a "zero tolerance" approach to drug abuse, intended not to prevent smuggling, but to punish prisoners caught with drugs. *See Bazzetta*, 148 F. Supp. 2d at 843. Major misconduct charges issue for possession of narcotics, alcohol, unauthorized prescription drugs, or drug paraphernalia, or for failure to submit to a drug test. They are not criminal convictions, but administrative punishments issued by prison authorities after a hearing. According to regulations, the ban may be imposed after two violations, with the approval both of an inmate's warden and the department's director. n2

n2 Here are the relevant regulations:

BBB. . . . The Director may permanently restrict all visits for a prisoner who is convicted of any of the following: . . . .

4. Two or more violations of the major misconduct charge of substance abuse.

CCC. If a prisoner has been found guilty of the conduct set forth in Paragraph BBB, the warden shall recommend that all visits be permanently restricted. S/he shall submit the recommendation, along with all supporting documentation, to the appropriate [regional prison administrator]. The [administrator] shall review and forward the recommendation to the []Deputy Director for review. If the []Deputy Director agrees that the restriction is warranted, the recommendation shall be submitted to the Director for a final determination. . . . .

FFF. The Director may remove a restriction upon written request of the warden or restricted prisoner, subject to the following: . . . .

2. The restriction shall not be considered for removal until at least two years after imposition . . . if it is based on two or more violations of the major misconduct charge of substance abuse if one or both of the charges were for possession or use of any prohibited substance other than alcohol. . . .

GGG. If eligible for removal of the restriction . . . a prisoner may request removal of the restriction by sending a written request to the warden of the facility where the prisoner is housed.

1. If the prisoner is eligible for removal of the restriction, the warden shall submit his/her written recommendation, along with the prisoner's written request if one was submitted, to the appropriate [regional prison administrator]. The [administrator] shall review and forward the documentation to the [Correctional Facilities Administration] Deputy Director. The [] Deputy Director shall review the request and make a written recommendation to the Director for a final determination. If denied, the Director shall determine when the prisoner may reapply for removal of the restriction.

Bazzetta, 148 F. Supp. 2d at 833-34 (quoting Michigan Department of Corrections policy directive 05.03.140)

Department regulations state that inmates may request the ban be lifted after two years, but it provides officials "no ascertainable criteria" for evaluating these requests. *Id.* at 839. While a hearing is required before a substance abuse violation is assessed against a prisoner, no hearing is required before imposing the permanent ban, nor are prison officials required to explain why a ban was imposed. *See id.* at 838 n.39.

In practice, as the district court amply documented, the department has imposed visitation bans capriciously and according to no reviewable standards. Between 1995 and 2000 only 41% of prisoners with two violations received permanent visitation bans. *Id.* at 837. Bans were often not imposed until well after a prisoner incurred the violations; an average of seven months passed between a second substance abuse violation and the imposition of a ban, and in a few cases three years passed between a second violation and the start of the ban. *Id.* at 837-38. Nor is the ban only imposed after two "serious" violations; on occasion it is imposed for what is effectively a single drug infraction. One inmate received a

permanent ban after being found in possession of marijuana (violation #1) and then testing positive for the drug 75 minutes later (violation #2); another received a permanent ban after throwing a packet of marijuana on the ground (violation #1) then being found with another on his person during the ensuing search (violation #2). *Id.* at 838 n.39.

Most troubling, once a ban is imposed it can only be removed at the discretion of prison officials, who need not explain their decisions and may continue the ban for any reason or no reason at all. The department has described the ban as a two-year ban, but in fact it is a permanent ban that may be removed after two years. Nor is it continued only for serious infractions; as the district court determined, the department has turned "permanent restrictions for substance abuse . . . into a tool for general behavior management, where restrictions are routinely continued on the basis of behavior for which policy does not authorize a visiting restriction in the first place." *Id.* at 844.

1. The Turner *test*--This harsh and arbitrary ban does not meet even the forgiving *Turner* standard. Deterring prisoner drug abuse is a legitimate penological goal. At trial, however, department officials produced only anecdotal evidence to show that the permanent ban on visitors has deterred drug abuse in the prison population. Once visitation is banned, there are no easy alternatives for keeping ties with family and friends outside prison. Brief phone calls cannot substitute for seeing a loved one, nor does the liberty to send and receive letters mean much to functionally illiterate prisoners. Finally, prison officials have at their disposal many other constitutional means of punishing prisoners for violating drug rules. There is no reasonable relation between the permanent ban and a legitimate penological interest.

2. Cruel and Unusual Punishment and due process--The permanent ban on visitors also violates the constitution's ban on cruel and unusual punishments, and the protections of the due process clause. *See* U.S. Const. Amts. VIII, XIV. The Eighth Amendment protects inmates not only from disproportionate and cruel sentences, but also from disproportionate and cruel conditions of confinement. *See Estelle v. Gamble*, 429 U.S. 97, 103 (1976). "Conditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). A prison official's actions violate the Eighth Amendment when (1) they are "sufficiently serious" to deprive an inmate of the "minimal civilized measures of life's necessities," and (2) the official knows of and disregards the significant risk they pose to an inmate's health and safety. *Farmer v. Brennan*, 511 U.S. 825, 834, 837 (1994). "[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact the risk was obvious." *Id.* at 842

Both those conditions are met here. As the district court found, depriving an inmate of all visitors for a period stretching indefinitely into the future is an extremely harsh measure, removing the "single most important factor in stabilizing a prisoner's mental health, encouraging a positive adjustment to . . . incarceration, and supporting a prisoner's successful return to society." *Bazzetta*, 148 F. Supp. 2d at 851. It "goes to the essence of what it means to be human; it destroys the social, emotional, and physical bonds of parent and child, husband and wife, body and soul. Nothing could be more fundamental." *Id.* at 855. It far exceeds punishments meted out by any other state prison system for comparable violations. *See id.* at 835. The second condition is also met, for the harm the ban does prisoners should be clear to any prison official minimally concerned with prisoners' welfare. Extensive evidence supports

the district court's finding that the "restriction has been imposed with a callousness that could serve as the definition of deliberate indifference." *Id.*

Finally, as imposed the punishment violated prisoners' due process rights. Not every prison deprivation merits due process; for a punishment to require due process it must exceed the sentence imposed in a notably "unexpected manner," *Sandin v. Conner*, 515 U.S. 472, 483 (1995), or constitute a change in conditions of confinement that amounts to a "grievous loss." *Vitek v. Jones*, 445 U.S. 480, 488 (1980). Applying these measures, we find that a complete ban on all visitors is such a grievous loss that it infringes on a liberty interest protected by substantive due process. Imprisonment inevitably limits who can visit a prisoner, but it does not dissolve inmates' marriages nor end their parental rights. A complete ban on all visitors cuts the prisoner off from all personal ties, constituting qualitatively greater isolation than is imposed by a prison sentence, and is an atypical and significant hardship far beyond the expected hardships of prison.

At a minimum, some notice and hearing is required before a prisoner is deprived of a constitutionally protected liberty interest, the degree of protection varying with the interest. *See Vitek*, 445 U.S. at 494-95. Though Michigan inmates are given a hearing before being found guilty of a specific drug offense, they receive no notice or hearing before officials impose the permanent ban. Once the violations are recorded, the ban is imposed or removed at the unfettered discretion of prison officials. Such a procedure falls far below the demands of due process.

We agree with the district court that the permanent ban on visits following two drug violations violates the First, Eighth, and Fourteenth Amendments to the constitution.

Conclusion

Under our constitution, even those lawfully imprisoned for serious crimes retain some basic constitutional rights. Instead of crafting policies that would legitimately meet the very real need to maintain order in prisons, the department has implemented a series of haphazard policies that violated these rights and did real harm to inmates in its care. It then defended these policies not with reasoned arguments, but with misdirection and demands that federal courts blindly defer to corrections officials. Prison officials have great leeway to govern prisons and prisoners as they see fit, if they can provide even a modicum of proof that a particular policy is desirable and serves legitimate ends. Here, as Judge Edmunds found in the case below, the department was unable to offer any convincing justification for its policies.

Years ago Winston Churchill made a telling statement about prisoners: "[a] calm and dispassionate recognition of the rights . . . even of convicted criminals against the state, a constant heart-searching by all those charged with the duty of punishment . . . .these are the symbols in which the treatment of crime and criminals mark and measure the stored-up strength of a nation." Speech in Parliament, Hansard column 1354, 20 July 1910. In the present case, the regulations fall below minimum standards of decency owed by a civilized society to those who it has incarcerated.

The district court's decision is AFFIRMED.

[148 F. Supp. 2d 813]

Michelle Bazzetta, Stacy Barker, Toni Bunton, Debra King, Shante Allen, Adrienne Bronaugh, Alesia Butler, Tamara Prude, Susan Fair, Valerie Bunton and Arturo Zavala, through his Next Friend Valerie Bunton, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

Kenneth McGinnis, Director of Michigan Department of Corrections, Dan Bolden, Deputy Director of the Correctional Facilities, Michigan Department of Corrections, Marjorie VanOchten, Administrator of the Office of Policy and Hearings of the Michigan Department of Corrections, Michigan Department of Corrections,

Defendants.

No. 95-CV-73540-DT

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

April 19, 2001, Decided

COUNSEL:

For MICHELLE BAZZETTA, STACY BARKER, TONI BUNTON, DEBRA KING, SHANTE ALLEN, ADRIENNE BRANAUGH, ALESIA BUTLER, TAMARA PRUDE, SUSAN FAIR, VALERIE BUNTON, ARTURO BUNTON, KIM STANTON HUNTER, plaintiffs: Michael J. Barnhart.

For MICHELLE BAZZETTA, STACY BARKER, TONI BUNTON, DEBRA KING, SHANTE ALLEN, ADRIENNE BRANAUGH, ALESIA BUTLER, TAMARA PRUDE, SUSAN FAIR, VALERIE BUNTON, ARTURO BUNTON, KIM STANTON HUNTER, plaintiffs: Deborah A. LaBelle, Ann Arbor, MI.

For MICHELLE BAZZETTA, STACY BARKER, TONI BUNTON, DEBRA KING, SHANTE ALLEN, ADRIENNE BRANAUGH, ALESIA BUTLER, TAMARA PRUDE, SUSAN FAIR, VALERIE BUNTON, ARTURO BUNTON, KIM STANTON HUNTER, plaintiffs: Patricia A. Streeter, Detroit, MI.

For KENNETH MCGINNIS, MICHIGAN DEPARTMENT OF CORRECTIONS, defendants: Barbara A. Schmidt.

For KENNETH MCGINNIS, MICHIGAN DEPARTMENT OF CORRECTIONS, defendants: George N. Stevenson, Michigan Department of Attorney General, Lansing, MI.

For KENNETH MCGINNIS, MICHIGAN DEPARTMENT OF CORRECTIONS, DAN BOLDEN, MARJORIE VANOCHTEN, defendants: Kevin M. Thom, Michigan Department of Attorney General, Lansing, MI.

For KENNETH MCGINNIS, MICHIGAN DEPARTMENT OF CORRECTIONS, DAN BOLDEN, MARJORIE VANOCHTEN, defendants: Lisa C. Ward, Lansing, MI.

For DAN BOLDEN, defendant: Lisa C. Ward.

JUDGES:
Nancy G. Edmunds, U.S. District Court Judge.

OPINION BY:
Nancy G. Edmunds

OPINION:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

Plaintiffs, inmates of the Michigan Department of Correction and their prospective visitors, brought this suit against the Director of the Department challenging various restrictions on visitation. Specifically, Plaintiffs challenge restrictions which 1) prohibit visits by siblings, nieces and nephews who are under eighteen years old; 2) prohibit visits by children whose prisoner parents have had their parental rights terminated (even when that termination is voluntary); 3) prohibit visits from former prisoners who are not immediate family; 4) require visiting children to be brought by a parent or legal guardian; and 5) impose a permanent ban on visitation for any prisoner who has been found guilty of two substance abuse misconducts.

With respect to claims 1 through 4, this Court issued two previous decisions, affirmed by the Sixth Circuit Court of Appeals, upholding the restrictions in the context of contact visits. Thus, the only remaining issue on claims 1 through 4 is whether the restrictions are constitutional in the context of non-

contact visits. Claim 5 was not ripe at the time of the earlier decisions and is addressed here for the first time.

In support of their claims, Plaintiffs presented testimony from a number of MDOC officials, present and former inmates, and from several experts and family members.

Marjorie VanOchten was the MDOC administrator of the Office of Policy and Hearings until January 2000; she drafted the rules at issue in this case. Although she had been an executive level official of the MDOC for over twenty years, she was critical of many aspects of the visitation restrictions, including the exclusion of minor siblings, nieces and nephews, the requirement that a minor child be accompanied by a parent or legal guardian, and the permanent ban on visitation following two substance abuse misconducts. She testified about her own concerns, concerns raised by the public, and about the procedural history and problems related to the restrictions.

Suellen Scarnecchia, Associate Dean for Clinical Affairs at the University of Michigan Law School, testified as an expert on the subject of incarcerated parents. She was particularly critical of the rule requiring a minor child to be accompanied by a parent or legal guardian and the rule precluding visits by a child whose prisoner/parent had terminated parental rights.

Dan Bolden, the Deputy Director of the MDOC since 1984, was called by Plaintiffs for cross-examination. He testified about the penological objectives of the rules and procedures used by the MDOC to draft the restrictions, and the reasons the Department had for deciding on particular exclusions and sanctions. He was cross-examined extensively on the justification for excluding minor siblings, nieces and nephews, on the efficacy of using non-contact visitation to address his various concerns, and on the procedural problems (inconsistent

enforcement, lack of notice and standards) related to the permanent ban on visitation following two substance abuse misconducts.

Phillip Creekmore, called by Plaintiffs as one of their experts, was asked to compile data supplied by the MDOC and summarize it in exhibit form. See Pls.' Exs. 41-48, 50-51. The statistical data compiled by Creekmore primarily addressed the issues of volume (including early termination of visits), misconducts related to visits, and the inconsistences in the enforcement of the permanent ban.

Barry Mintzes is a psychologist who worked for the MDOC from 1970 to 1982, including positions as administrative assistant to the director, and warden of the facilities at Kinross and Jackson. In criticizing the Department's permanent ban on visitation following two substance abuse misconducts, Dr. Mintzes testified about the importance of visitation to prison management, as well as for the rehabilitation of the prisoner. He also testified that the use of visitation standards and non-contact booths would have been more than adequate to meet the penological objectives stated by the Department, without excluding whole categories of visitors.

Joan Yukins, the warden of the women's facility in Plymouth (Scott), was called as an adverse witness. She testified about the impact of the restrictions concerning minor children, particularly as they affect women prisoners, and she was also cross-examined about the procedural difficulties she and the inmates encountered in connection with the permanent ban (inconsistent enforcement, inadequate or confusing notice, absence of criteria for restoration of privileges, collateral consequences).

Dr. Terry Kupers, a psychiatrist with extensive background in correctional issues, was one of Plaintiffs' key witnesses. Dr. Kupers testified about the importance of visitation to the mental health, stability, and rehabilitation of the prisoner. He commented on the impact of incarceration on family bonds, and the additional impact caused when visitation is restricted; he testified to the inadequacy of telephone calls and letters as alternatives, particularly where children are involved. Although Dr. Kupers touched on a number of topics related to the visitation restrictions, the primary thrust of his testimony was the social and psychological damage caused by the permanent ban on visitation, the counterproductive effect on long term drug abuse and the prisoner's reintegration with society, the destruction of marital and family relationships, and the cruelty involved in the Department's denial of a basic human need. He also testified that Michigan's visitation restrictions are an excessive response to problems with much better alternative solutions, and that Michigan's use of visitation sanctions in this manner is unique among prison management regulations.

Plaintiffs also called a number of prisoners, former prisoners, and family members who testified about the impact of the various restrictions on their family relationships and mental health.

Defendants did not challenge or contradict any of Plaintiffs' experts with experts of their own. Instead they relied on the testimony of a number of MDOC witnesses to support the penological objectives of the rules and to otherwise counter Plaintiffs' claims.

Kenneth McGinnis, Director of the MDOC from 1991 to January 1999, testified concerning the penological objective of maintaining security with the increasing volume of visitors. He testified to security concerns involving minor children, and he discussed the impact of the visitation standards introduced in

1995. With respect to the permanent ban on visitation, Mr. McGinnis testified about his desire for a zero tolerance policy to get at the problem of drug abuse within the system, which he considered to be ongoing and complex. He was cross examined about the justification for excluding minor siblings, the procedural inconsistencies with the permanent ban, the alternative of using non-contact visitation, and the criticism of the permanent ban as being overly harsh and punitive.

Pat Caruso, an MDOC regional administrator and former warden, testified about the difficulties of managing the visiting room in a level 5 facility. She testified that the permanent visitation ban was a powerful management tool, particularly because level 5 and 6 prisoners are already restricted to non-contact visits.

Pamela Withrow, a warden at various MDOC facilities since 1983, supported the decision to exclude as many minor children as possible from visitation, including minor siblings. She also testified that non-contact visitation does not solve the security concerns addressed by the rules, because sexual misconduct can occur even in non-contact booths.

Kurt Jones, who has been with the MDOC since 1977, has been the warden at Carson City since 1996. He testified that the 1995 changes have had a positive impact on the visitation process, and that he supports the permanent visitation restriction because he believes it has helped reduce substance abuse misconduct.

Sally Langley, the warden at Crane (women's) facility, also testified in support of the permanent visitation restriction as an effective management tool.

Finally, Julie Southwick, administrative assistant to Dan Bolden, testified concerning the availability of non-contact

booths, the policies of several other states concerning visiting restrictions, and the procedure for seeking restoration of visiting privileges.

In addition to the witnesses called, both parties submitted exhibits and affidavits, including a selection from the random sample (20%) of all prisoners placed on permanent visitation restriction since 1995. n1

n1 Plaintiffs requested and Defendants objected to the production of the files of all prisoners placed on permanent restriction since 1995. The Court ordered that Defendants produce a random sample of 20% of those files, which amounted to approximately 250 files. A portion of these files were introduced as Plaintiffs' Exhibit 40 Order, 6/22/2000; Tr. 3, p. 135.

These matters were tried to the bench in the fall of 2000; the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. Importance of Visits

Visits from family and other loved ones are extremely important in the life of most prisoners. A broad consensus, supported by decades of research, affirms that visits promote rehabilitation, reduce behavior problems, and significantly increase a prisoner's chance for success on parole.

Visits are also important to maintaining prisoners' mental health. Because a high percentage of prisoners suffer from significant substance abuse, mental illness, and life-threatening illnesses, they are particularly vulnerable to the impact of stress. Visits help ease the impact of these conditions, particularly for those suffering from depression or dual

diagnosis (mental illness combined with substance abuse). Letters and telephone calls are inadequate as an exclusive means of maintaining family bonds over a period of years. n2

n2 Dr. Terry Kupers, a psychiatrist with extensive experience in prison issues affecting mental health, testified that,

> [s]ocial relations are very important to human beings in general in terms of maintaining . . . their mental health, their self esteem, their connection with reality, and we have studies that show that isolation, whether it's cabin fever, exploration of the arctic, or isolation in captivity, causes very severe mental illnesses, including psychosis, including suicide.
>
> So disconnection from people who have a meaningful, caring relation with one causes one's mental health to plummet.

Tr. 6, pp. 130-31.

With respect to the adequacy of telephone calls and letters as alternatives to visits, Dr. Kupers stated:

> I mentioned that 40-some percent of prisoners are illiterate. I would put it more like 60 or 80 percent cannot compose a decent letter. Literacy, functional literacy is defined as being able to write a check or do a transaction at a sales counter, so to write a letter that expresses anything very deeply, I'd say 60 to 80 percent of prisoners are incapable of doing that, and their family, for instance, young children, are incapable of doing that.

> So the letter writing is not, is not as good all together, but then, in addition, letter writing is controlled in prison, that is, that mail is often read, or there's the realistic expectation that the mail will be read, so you have to censor what you say. There are long delays in getting mail in and out depending on the situation within the correctional facility.
>
> Phone calls are even more problematic. If you or I pick up the phone and call someone, a relative, we have free and unfettered oral contact. In prison that's not the case. It's very difficult to find time in many prison situations to make the call. The call is expensive, and many of the families, as I said, these are low income people and low income families, can't afford phone calls.
>
> They're approximately three to five times as expensive when made from a prison, and the phone calls usually have to be initiated from the prison and made collect. There are many families that either move, they lose their phone because they can't afford the bill or whatever, so the phone, actual contact doesn't occur, or if it occurs, every few minutes there's a tape that comes on that says you are talking to an inmate at a state institution, and that's very disruptive to any kind of meaningful communication. There's also, depending on the security level, usually time limits and halts to the phone call.

Tr. 6, pp. 143-44.

Because of the importance of visits to the prisoner, the system, and the larger community, the American Correctional Association Standards state that visits should be limited only by institutional schedule, space, and personnel constraint, or when there are substantial reasons to justify limitations; that prisoners should be permitted to visit with people of their choice unless there is a clear and convincing threat to safety and security; and that even prisoners in segregation should have opportunities for visitation unless there are substantial reasons for withholding it. Defendants' visiting policy used to expressly state that visits are important to rehabilitation and post-release adjustment, and should be encouraged. n3

n3 As explained by Dr. Kupers:

> Separation from family is part of the function of incarceration. It's part of the function of quarantining people. Their contact with family and loved ones and friends and community is severed. The idea, then, is to restore some unity and some continuity of close bonds by having visitation. That's why, in almost every arena, visitation is required, whether it's the Department of Corrections in Michigan, and their policies state that.
>
> Many of the states mention in their policies that contact with family gives a prisoner a better chance of succeeding after they're released, and therefore the department wants to foster it. The United Nations mentions that, the United States general accounting office mentions that in their reports on incarceration. It's crucial that a prisoner have contact with loved ones in order to maintain their stability while they're in prison, to do their program without falling apart, and then to prepare and then succeed at post release, becoming part of the community again.

Tr. 6, pp. 133-34.

II. Imposition of Restrictions

The evolution of the challenged restrictions goes back to the early 1990's. Michigan's prison population increased substantially from 1990 to 1994, and has continued to increase through 2000. Many facilities house inmate populations beyond their intended capacities; double bunking became commonplace by the early 1990's. *See* Tr. 1, pp. 72-73. In none of these facilities, however, was visiting space expanded to accommodate the additional prisoners. *See* Tr. 1, p. 73.

By 1994, some management personnel at MDOC perceived problems related to the increased number of visitors and visits at the facilities. These problems included the necessity to terminate some visits early, n4 the difficulty of detecting drug trafficking and smuggling related to visits, and the difficulty of supervising young children who became bored or restless during long hours in the visiting room or waiting room.

n4 Actual termination statistics do not support the Department's perception of the problem as being widespread. *See* Pls.' Ex. 45 (showing the percent of visits terminated for lack of space on a yearly basis from 1994/95 through 1997/98, shows that the total percent of terminations prior to the challenged restrictions was 0.71%). The only facilities where terminations exceeded 2% were SMT Parnall (2.44%), STF Mid-Mich Temp (2.79%), and ARF Gus Harrison (2.08%). Thirty-one of the Department's thirty-nine facilities which were open in 1994/95 had fewer than 1% of visits terminated; ten facilities had zero terminations, even prior to the imposition of the first wave of restrictions. To the extent

that this problem existed, it appears to have been limited to a few of the downstate facilities.

As an initial response to these problems, in April 1995, the MDOC promulgated regulations which established certain restrictions on visitation, department-wide visiting standards to be applied uniformly at each facility. *See* Pls.' Ex. 4 ("visiting standards"). These standards, adopted the following month, limited the number of visits allowed to prisoners each month, depending on their security classification, restricted the hours of visitation and the number of weekend visits, and also restricted the number of persons who could visit a prisoner at one time. n5 Facilities which housed prisoners in more than one security level were required to split their visiting hours between those groups of prisoners. These standards are not challenged by Plaintiffs.

n5 Prior to their adoption, the consideration of the department-wide visiting standards provoked a number of comments from wardens and other management personnel. Warden Luella Burke, of the Saginaw Correctional Facility, wrote to observe that prisoners at multi-level facilities such as Saginaw would be penalized by the mandatory separation of visiting hours; Warden Robert LeCureux of Hiawatha/Kinross wrote to suggest that visitors to facilities in the Upper Peninsula could rarely visit midweek because of the distance, making the limit on weekend visits unnecessarily harsh and restrictive; Warden David Trippet of the Thumb Correctional Facility wrote to suggest some incentives for prisoner behavior which would increase their visiting privileges under the new standards. Wardens Yukens, Burt and Holland requested variances which were granted on a temporary basis "pending additional revisions to the agency-wide standards which are scheduled to become effective May 15, 1995."

In each case, the request was denied by the Director or one of his deputies. *See* Pls.' Exs. 9, 10, 11, 12, 14, and 15.

Later in 1995, the Department issued amendments to administrative rules for prisoner visiting privileges. The 1995 rules that are at issue in this case set forth the following criteria, among others: [Mich. Admin. Code Rule 791.6607 through 791.6614]

Define what persons are in a prisoner's immediate family; [For purposes of this provision, siblings are defined as immediate family]. *See* § 791.6609(9).

Limit the number of visitors for a prisoner; [Prisoners are limited to an approved list of ten visitors, not including immediate family]; *see id.* § 791.6609(2).

Require visitors and immediate family members to be on a prisoner's list of approved visitors; [Pre-screening of all visitors.] *see id.* § 791.6609(2).

Restrict prisoner's access to minors, in that minors under the age of 18 are not permitted to visit unless they are the child, stepchild, or grandchild of the prisoner and accompanied by an adult immediate family member or a legal guardian. Additionally, a child is not permitted to visit if the parental rights of the prisoner have been terminated; *see id.* § 791.6609(2)(b), (5), (6).

Prohibit former prisoners from visiting unless they are the immediate family of a prisoner or unless prior approval for the visit is obtained from the warden of the institution where the visit will occur, *see id.* § 791.6609(7) and

> Permanently ban all visitation (other than attorneys or clergy) for prisoners with two or more major misconduct charges of substance abuse. *See id.* § 791.6609(11). n6

See Pls.' Ex. 1.

> n6 Substance abuse misconducts include not only use or possession of narcotic drugs such as marijuana, heroin and cocaine, but also use or possession of alcohol or any intoxicant, unauthorized use or possession of prescribed or restricted medication, failure or refusal to submit to drug testing (urine tests or drug patches), and possession of narcotics paraphernalia. *See* Pls.' Ex. 2, MDOC Policy Directive 3.03.105, p. 5.

MDOC Deputy Director Dan Bolden testified that one goal of the Department in enacting visiting restrictions was to reduce the volume of visits and visitors by 10-15%. *See* Tr. 3, p. 83. As a result of the restrictions imposed by the visiting standards adopted in May 1995, the volume of visits and visitors decreased substantially over the next several months. Plaintiffs' witness Philip Creekmore, who compiled summaries of visiting statistics from MDOC's computerized visitor tracking system and other MDOC documents, testified that in April 1995, most facilities were below two visits per inmate per month, and that indeed the majority were below one visit per inmate per month. With respect to the fifteen facilities which had the highest volume of visits, the April 1995 average was 2.407 visits per inmate; that ratio dropped in August/September 1995 to 1.5 visits per inmate. The ratio decreased further in October 1995, down to approximately 50% of the numbers prior to the May 1995 rule change. Thus, within six months, the visiting restrictions exceeded, by three to five times, the original goal of a 10-15% reduction in prison

visits. In succeeding months and years, the ratio of visits per month per prisoner remained relatively flat.

If the statistics are examined in terms of the number of visitors rather than the number of visits, one finds a decrease of approximately 25% from 1994 to 1995, n7 another 24% from 1995 to 1996, and another 10-15% from 1996 to 1997. *See* Defs.' Ex. 6. Again the result of the restrictions far exceeded the original reduction goals.

> n7 One cannot tell how much of this decrease occurred between May and September of 1995 (and would thus be attributable to the department-wide standardization) and how much occurred between September and December 1995 (and would thus be attributable to both the standardization and the more restrictive operating procedures).

Marjorie VanOchten, the former MDOC Administrator of the Office of Policy and Hearings who drafted the administrative rules concerning visitation, testified that the visiting standards that Deputy Director Bolden drafted were supposed to have an impact on volume. *See* Tr. 1, p. 66. She does not recall any discussion about increasing the use of cameras or increasing the number of staff supervising visits as an alternative method of addressing problems caused by the volume of visits. *See* Tr. 1, p. 71. She stated:

> A. . . . The idea was that the volume would be decreased by these standards and by the rules, and so you would have fewer people in the visiting room, so it would be easier for the one person who had been in the room before -- there had always been an officer monitoring visits, it would be easier for that officer to monitor visits if there were fewer people.

> Q. And in the standardization and with the list of 10, visits have decreased almost in half, isn't that true?
>
> A. . . . that sounds right, about half. It was significant, I know.

Tr. 1, pp. 71-72.

Ms. VanOchten also indicated that there was no attempt, during the consideration and drafting of the rules, to actually quantify the number of children who were visitors or the number who would be excluded by the new restrictions. *See* Tr. 1, pp, 58, 75.

One of the concerns articulated by the Department was that the large number of visitors contributed to the volume of drugs and other contraband smuggled into the facilities. Although several MDOC witnesses testified that they believed drugs and other contraband were introduced into prison facilities through visitors, little hard data was available to confirm or refute this. Plaintiffs' Exhibit 44, compiled by Philip Creekmore from MDOC records, shows the misconduct to visit ratio from 1995 to 1997 for all facilities, i.e., the number of misconducts that were related to something which occurred during or related to a visit. With the exception of one facility, AMI, which showed a spike to six per thousand visit-related misconducts in 1996 (compared to zero per thousand in 1995 and 1997), the ratio was almost completely flat over the three year period. With respect to non-contact visitation, the MDOC acknowledged that it has no records reflecting an incident of introduction or attempted introduction of contraband during a non-contact visit since January 1, 1994. *See* Pls.' Ex. 39, P 4.

Another articulated concern in passing the visitation restrictions was the safety and security of minor children. In 1994, an inmate at the MDOC Muskegon facility was found to

have molested a three year old girl who had been brought to the facility by her mother (a friend of the inmate) for a prison visit. This horrible incident spurred the Department to re-examine its regulations concerning visits by minor children; the Department was also concerned generally with the security and safety issues which arose when children spent long times waiting or confined to the visiting room.

To address these concerns, the Department issued regulations through a Director's Office Memorandum 1995-58, effective August 25, 1995, limiting visits by minor children as follows:

> Visitors under the age of 18 must be the child, stepchild, or grandchild of the prisoner . . .
>
> . . . .
>
> A person under the age of 18 may be placed on a prisoner's approved visitors list only if s/he is an emancipated minor or is the child, stepchild or grandchild of the prisoner, except that in the following circumstances, placement of the child on the list shall not be approved [if]:
>
> > (a) The parental rights of the prisoner to the child have been terminated.

Pls.' Ex. 5; *see also* Pls.' Ex. 1 (the part of the Administrative Code which incorporated the regulations in the Director's Office Memorandum).

Thus, although siblings are considered "immediate family" for inclusion on a prisoner's approved visitor list (and thereby exempted from the quota of ten), siblings under the age of eighteen are precluded from any and all visitation, as are minor

nieces and nephews, and children whose parents have terminated their parental rights. *See* Pls.' Ex. 1, Mich. Admin. Code R. §§ 791.6609(2), (6), (7).

III. Exclusions of Minor Siblings, Nieces and Nephews

On the issue of sibling visitation, Department witnesses all acknowledged that they had no specific penological or other substantive concern relating to this exclusion, other than the general objective to reduce the number of children visiting to the greatest possible extent. Marjorie VanOchten, the former MDOC Administrator of the Office of Policy and Hearings, expressed in writing her concern about the narrow definition of minor children permitted to visit, but her suggestions for more flexibility were rejected. *See* Pls.' Ex. 14. Ms. VanOchten testified as following:

Q. Let's talk about, unless they had some close relationship of the prisoner. What about a brother or sister of the prisoner? Was that rejected as simply not a close relationship?

A. I don't recall a lot of discussion. I know that subsequently it became -- it became more of an issue because I think we didn't realize at the time that so many prisoners would have siblings who were under the age of 18 because, of course, if they're 18 or older, they would have been allowed under the definition of immediate family.

It's just if they were under the age of 18, and there just was not an appreciation of the number of prisoners who we would have who had siblings who were under the age of 18. I know that subsequently there was a lot of attention to that particular issue because it affected a number of people.

Q. Initially, is it fair to say that the siblings were excluded not because of any stated purpose, but because people just didn't think about it?

A. We really did not think about the impact it would have, didn't realize that there would be as many people affected as it turned out there were.

Q. But was there a specific rationale given at this time as to why siblings, some rationale that connected with the penological purpose, why the siblings, the younger brothers and sisters of prisoners should not be allowed in?

A. Not other than the general concern about children that I just articulated.

Q. The general concern you articulated about children was, we're not a day care center and children who are unrelated to prisoners shouldn't come in; is that correct?

A. Well, just that -- not exactly. It's not a day care center and that the children who are allowed in should have a close relationship with the prisoner so that you would limit the number of children who were inside the prison as much as possible.

The idea was we don't like children in here at all. Let's make sure we have as small a group as possible, but we realize we have to let people see their children and their grandchildren, and so we'll let those people in, but other than tnat, we just wanted to keep the number of children inside the prison as limited as possible.

Q. Do you think brothers and sisters aren't close?

A. I think brothers and sisters are close, no question about it.

Q. You think they should have been included in the rules?

A. That was the recommendation that I made.

Q. Do you see any penological difficulty through security or any other concern that would be impacted by letting prisoners see their younger brothers and sisters?

. . . .

A. The only thing would be it would expand the number of minors, children in the prison. How much, I don't know, and that might be a concern. But other than that, I don't see any concern with allowing siblings to come and visit.

Q. Did anybody ever know how many siblings you were talking about, whether it would cause any impact at all?

A. Not that I'm aware of. There was not anything done to try to quantify that.

Q. And certainly siblings weren't -- minor siblings weren't pulled out as a significant source of volume in any of your discussions?

A. No, no.

Tr. 1, pp. 55-57, 58.

The new restrictions on minor visitors have had enormous negative consequences for prisoners and their families. Siblings, nieces and nephews under eighteen who had been visiting without incident could no longer see their incarcerated brothers, sisters, aunts, and uncles. n8 The prohibition on minor nieces and nephews makes it difficult for the prisoners' adult siblings to visit because they cannot bring their own children, or for the prisoners' own parents to visit if they cannot bring other grandchildren for whom they are caring, and this may even prevent the prisoner from seeing his or her own children if these relatives are caring for the prisoners' children as well. n9

n8 *See* Shier, Tr. 2, pp. 113, 116; Spencer, Tr. 2, pp. 135, 138; Yukins, Tr. 6, p. 56; Carter, Tr. 2, pp. 168, 170-71; Smith, Tr. 2, pp. 149, 152-153; Brewer, Tr. 2, pp. 69-73; Shanks, Tr. 2, pp. 124-125, 127.

n9 *See* Shanks, Tr. 2, p. 128; Pls.' Ex. 14, p. 2, P 1 and p. 3, P 5.

Deputy Director Dan Bolden testified that three of his major concerns related to visits by minor children were "smuggling of contraband, physical injury and sexual assault." Tr. 3, p. 33. He also stated his administrative concern about the supervision of unruly children, and his "personal and philosophical" belief that prison is "not a good place for kids to grow up," that kids should fear prison and that they should not visit because they become "too comfortable" with the prison environment. Tr. 3, pp. 33, 58-60.

On the general subject of prison visits by children, Mr. Bolden acknowledged as follows in cross examination:

Q. Could you give me an idea of the number of critical incident reports that you've -- that have been issued relating to children in the visiting rooms or the parking lots?

A. I absolutely cannot. I'm speaking basically of my own personal observations from the time that I worked in prisons and the time that I visited prisons from what I observed. I don't have any documents or any numbers I can give you. Mine are from personal observations.

Tr. 3, p. 34.

A. Yes, with our visitor standards, we have continually tried to enforce children -- being responsible for the children.

Q. And how do you do that?

A. By warnings and termination of visits if they're not.

Q. And do you have any idea how many times that's had to occur in the last five or six years?

A. No, I do not.

Q. Do you know if it's occurred?

A. Yes, I do know it has occurred.

Tr. 3, p. 35.

Q. Do you believe that -- let me -- your testimony is that you do believe that injuries are occurring in the visiting rooms?

A. I said I think injury -- injuries do occur, and there's always a potential for injury to occur. When children are not supervised properly, we have moving gates, we have things that you can climb on. We have prisoner porters in a lot of institutions that are working in administration buildings, and they're working up front or on the grounds, so there is a potential for injury to a child under those circumstances.

Q. Okay. So you're not saying that children are in fact being harmed. There's just a potential for harm; is that correct?

A. I'm saying that I am aware of a -- I'm aware of situations where children can be harmed. I'm not -- I can't cite you any specific situations where a child has been harmed. If I said that, I misspoke myself. I'm saying that there are situations in a prison environment, in the visiting room and administration building, between the gates, where a child is at some risk if they're not properly supervised.

Tr. 3, p. 37.

Q. Do you know how many children currently are visiting prisoners?

A. No, I do not.

Q. And as far as you know, there are, at least in the waiting room, no actual injuries to children; is that correct?

A. There are none that I can under oath testify to.

Q. But you are sure that there is potential for injury.

A. I'm certain of that.

Q. But today you do not have any information for us that there has been injury at least in the last four or five years; is that correct?

A. Well, I can't say that because I don't know.

Q. Well, would you at least agree that if there has been an injury or two or three, the number of injuries would be minuscule in comparison to the number of visits per year?

A. I don't have any data to substantiate that fact, but I think it would be small.

Tr. 3, pp. 39-40.

Q. Now, I'd like to get a sense of the number of children visiting before the rules, say up to 1995 and after 1995. Could you give me a sense of what percentage of children visited before, and then after the rules?

A. I can't give you a number. There was a significant number that did visit before the rule change, but I can't give you a percentage or a number, but there were a number of children that visited.

Q. In your mind, what does significant mean? Is it 5 percent, 10 percent?

A. I would say that most cases, where there was females coming to visit, there was at least one to two children with that visitor, so how do you break that out on a percentage basis, I don't know, but there were probably -- prior to the rule changes, there was probably 10 to 15 percent would probably be a good number.

Q. And it's your best estimate that 10 to 15 percent of all visitors that go into the visiting room or come to the facility and are in the waiting rooms.

A. Well, they come to visit, and we're talking about pre-rule change, as I understood the question.

Q. I just want to be clear. So it would be fair to say that 10 to 15 percent of the visitors before the rules went into effect were children; is that correct?

A. That is a very rough estimate on my part.

Q. And for purposes of my question, by children, I'm meaning people under the age of 18.

A. Yes.

Q. Is that also your understanding?

A. Yes.

Q. Now, what about after the rules took effect?

A. I think the number has been substantially reduced after the rule change.

Q. To what level do you think it's reduced?

A. I don't have a precise number or percentage, but I know there's been substantial reduction in the number of children coming after the rule change.

Q. For the groups that were coming in before, the 10 to 15 percent coming in before the rule change, did you have any sense of whether they were related to the prisoner they were visiting?

A. I don't have a sense of the kinship or relationship of those that were coming prior to the rule change. I just can't tell you definitively one way or the other.

Q. Do you have any sense of, before the rule change, who the children accompanying the adult were visiting?

A. Yes. Prior to the rule change, I had some general idea that a number of the children that were coming to visit were the children of girlfriends of prisoners, they were children that were in some cases relatives, distant relatives of the prisoner. I think it just filled the whole spectrum of types of people that were coming to visit. But a lot of circumstances the children were children of the girlfriend of the prisoner.

Q. Who just were not related at all?

A. Yes.

Q. By distant relative, what do you mean?

A. Well, maybe a nephew, niece, or a cousin, people of that kinship.

Tr. 3, pp. 46-49.

Q. What changes have you made at your facilities to make them more safe for children?

A. Well, the big change, I think, to make facilities safer for everybody, is dealing with drugs and narcotics. Seems to me to be the, a central theme here.

Q. So in terms of children running around, being left abandoned in the parking lot, getting into administrative offices, you have not made any specific change that would address those things that you say make them not safe?

A. I didn't understand the question. Let me answer that question and--One of the things that we did is reduce the number. By reducing the number, you can better supervise those that are there. Before, we had visiting rooms that were packed elbow to elbow, and often out our front door, which made it very difficult to supervise children or anybody else. By reducing the number to a manageable number, our front desk staff can properly supervise and monitor what's going on.

Q. And reducing the number, are you referring to the point in time when, in 1995 when prisoners were required to have an approved visitor list?

A. I'm talking about what has happened -- you asked me what had happened in the way of improvements or changes to ensure children's safety, and what I said we

have done is as a result of the new rules and the new visiting standards, we have reduced the number to a manageable number where we can properly supervise the children and the guests that are visiting in our facilities.

Q. So when you say reduce the number, you're referring to overall visitors, and not a prisoner's list?

A. Yes, I'm talking about the overall visitors.

Q. So the changes at the facilities, you have not made changes a facilities other than the rules that are under discussion today?

A. Not other than as they relate to your question.

Q. For example, you didn't add staff or change the seats, number of seats, carpet on the floor?

A. No, we did not make any of those kind of changes.

Tr. 3, pp. 53-54.

Q. I notice in your credentials you have a degree in sociology; is that correct?

A. That's correct.

Q. And that was from what year?

A. 1967.

Q. And have you read any studies or literature that supports you in this view? [that children who visit

prisoners become too comfortable with the environment]

A. No, I have not.

Q. Have you spoken with a statistically significant number of children to reach this conclusion?

A. No, I have not. I think I testified that a lot of this was my personal and philosophical rationale. I don't ever recall saying I read a study or talked to anyone.

Q. In your studies for your sociology degree, did you study child development at that time?

A. Yes.

Q. And since that time have you become aware of any studies that addressed the risk for children created by separation from the parents or how the separation would manifest differently in different age groups?

A. No, I have not read anything, and I don't advocate total separation.

Q. You're not a psychologist, are you?

A. No, I'm not.

Q. You do not purport to be able to professionally evaluate what's in the best interest of a child, do you?

A. I do not.

Tr. 3, pp. 60-61.

Q. And the department's definition of immediate family for purposes of visiting a prisoner under the age of 18 excludes brothers and sisters, nieces and nephews and cousins; isn't that correct?

A. That is true.

Q. Do you have any idea how many nieces and nephews under 18 would want to visit your prisons?

A. I don't have a clue as to how many there would be.

Q. What about brothers and sisters under 18?

A. I don't have a good handle on what that number would be either.

Tr. 3, pp. 71-72.

Q. Now, are you aware that aunts and uncles that have acted as a surrogate parent to a prisoner may visit?

A. Yes.

Q. But you do not allow nieces and nephews under 18 to whom a prisoner has been a surrogate parent to visit?

A. Well, I think if someone can make a case that they provided significantly to someone's upbringing, that that's one of those cases where an exception would be sought. I was the person responsible for the language with regard to aunts and uncles, as I

understand fully that a lot of the minority prisoners were raised by someone other than a natural parent.

Q. Under the rules as written, you do not allow nieces and nephews under 18 to whom a prisoner has been a surrogate parent to visit?

A. That's right.

Tr. 3, p. 73.

Q. Okay. Now, one of the points I believe you've made in your prior testimony is that your opposition, generally speaking, to nieces and nephews under 18 visiting was because you couldn't verify that they were nieces and nephews. Do you recall that testimony?

A. Yes.

Q. And isn't it the case that when a prisoner comes into the system, he comes with a presentence report that identifies family members?

A. I don't think it goes to nieces and nephews. I've looked at many, many presentence reports, and it usually covers your immediate family; mother, father, siblings.

Q. My question was does it identify brothers and sisters?

A. Yes.

Q. And the presentence report stays in the institution, and even the counselor's files, does it not?

A. Yes.

Tr. 3, pp. 76-78.

Q. If the brother or sister can produce a birth certificate of their child, doesn't that give you adequate documentation of a niece or nephew?

A. I think it would if you could get access to that kind of information.

Tr. 3, p. 78.

Thus, the thrust of Mr. Bolden's testimony is that the restrictions on visits by minor siblings, nieces and nephews evolved out of the broader desire to reduce visits by minors in general, that this broader desire was based primarily on personal observation and philosophy, and that there is no documentation or other evidence to support the need for or the efficacy of those particular restrictions. Minor siblings, nieces and nephews appear to have been restricted from visitation out of the general desire to reduce the number of minor visitors, and not because of any specific concern for their safety or the security of the prison.

Warden Joan Yukins of the Scott Correctional Facility (women) acknowledged that some of the inmates at Scott were as young as fourteen years old, that many had younger brothers and sisters who were precluded from visiting, that prior to the 1995 rule change there had been no problems at Scott related to sibling visitation, and that this particular limitation was not one she had recommended. *See* Tr. 6, pp. 56-57. She also testified that she did not know the volume of non-contact visits at Scott, nor the number of minor siblings, nieces and nephews who visited Scott prior to the 1995 rule change.

When asked about the concerns which led to the change in visitation in 1995, former MDOC Director Kenneth McGinnis testified to many of the same issues that Mr. Bolden raised: security, overcrowding, introduction of contraband, inappropriate visiting room behavior, and sexual abuse. He also acknowledged that he was not aware of the number of minor siblings, nieces or nephews visiting MDOC prior to the 1995 rules, and that he had not considered the sibling relationship when the policy was implemented:

Q. Did you ever know how many siblings were visiting the facilities in 1994, minor siblings?

A. No, I did not.

Q. And you were never able to determine that number, were you?

A. No.

Q. Nieces and nephews, were you ever able to determine how many nieces and nephews visited your prison facilities in, let's say, '94?

A. No, I do not.

Q. And that would be the same for minor nieces and nephews?

A. That's correct.

Q. Your position is that you wanted to stop minors who didn't have a relationship with prisoners from coming in; correct?

A. Well, first, that was the primary issue, is that we really wanted to minimize any minors coming into the institution except for those who had a real purpose in being there.

Q. A real purpose. Is it your position that brothers and sisters of prisoners don't have a relationship with them?

A. No, I don't think that's my position. I think the primary relationship we were focusing on was parent-child.

Tr. 8, pp. 40-41.

Q. Did you specifically talk about excluding minor brothers and sisters with the Executive Policy Team?

A. No.

Q. Did you specifically discuss excluding minor nieces and nephews when you prepared the rules with the Executive Policy Team?

A. Yes, there was a discussion about that.

Q. There was a discussion about nieces and nephews but not siblings; correct?

A. Yes.

Tr. 8, pp. 41-42.

Although Mr. McGinnis, Deputy Director Bolden, and Warden Withrow testified that they were aware of sexual misconducts occurring in non-contact situations, no evidence

was presented to establish that minor children were either involved in or able to see any such activity. *See* Withrow, Tr. 8, pp. 139-142; Bolden, Tr. 4, pp. 32-33; McGinnis, Tr. 8, p. 8, 52-55. Defendants also acknowledged in their discovery responses that a survey of all correctional facilities has revealed that no records exist reflecting or identifying incidents of sexual abuse or misconduct of minors which occurred during a non-contact visit since January 1, 1984.

Plaintiffs also introduced a statement made by Regional Administrator Denise Quarles, who stated that the exclusion of visits by minor siblings had been inadvertent, and that the Department had decided to support a change in the Administrative Rule so as to permit visits by minor siblings. *See* Pls.' Ex. 56. That change has never been implemented.

The restrictions on minor visitors have disrupted family relationships in a myriad of ways, as testified to by over a dozen different witnesses. n10 Moreover, the penological interests identified by Defendants seem to have a weak connection, if any, to the limitations placed on minor visitors.

n10 *See* Shier, Tr. 2, pp. 113, 116-118; Spencer, Tr. 2, pp. 135, 137-144; Carter, Tr. 2, pp. 168, 170-172; Smith, Tr. 2, pp. 147, 149-154; Brewer, Tr. 2, pp. 68-78; Shanks, Tr. 2, pp. 124-128; Hendricks, Tr. 2, p. 94; Benejam, Tr. 2, pp. 27-29, 31, 41-46; Yukins, Tr. 6, p. 56; Kupers, Tr. 6, p. 154; Scarnecchia, Tr. 1, p. 197-200.

With respect to the issue of reducing volume generally, Defendants estimate that prior to the 1995 rule changes, 10-15% of visitors were minors. Defendants have no idea how many of these minors who visited prior to 1995 were siblings, nieces and nephews, as opposed to girlfriends' children or others unrelated to the prisoner. n11 Because nieces and nephews over eighteen can visit a prisoner so long as they fit

within the prisoner's approved list of ten non-immediate family members, there appears to be no logical justification for excluding nieces and nephews under eighteen, who would also have to fit within the list, as a means of controlling the volume of visits. n12

n11 *See* Bolden, Tr. 3, pp. 47-49; McGinnis, Tr. 8, p 40; Yukins, Tr. 6, p. 117.

n12 *See* Pls.' Ex. 1 -- R 791.6609(2); McGinnis Tr. 8, p. 42 (no one can get into a facility without getting on the approved list); Yukins, Tr. 6, p. 53 (to be on approved list, visitor applications must be completed, counselor checks prisoner file for information related to proposed visitor, and deputy warden approves or denies).

Although Defendants speculate that small children might be used to carry contraband, there is no evidence that relatives under eighteen present any greater risk of smuggling than relatives over eighteen, n13 and concern about smuggling was not the basis on which siblings, nieces and nephews under eighteen were prohibited from visiting. n14

n13 *See* Bolden, Tr. 4, p. 66-67 (not suggesting that siblings or nieces are more likely to smuggle than average visitor).

n14 *See* VanOchten, Tr. 1, pp. 52, 76 (no special concern that children generally or nieces and nephews in particular are smugglers); pp. 57-58 (no security concern would be affected by letting siblings visit).

Defendants have numerous ways of controlling smuggling, even on contact visits, that do not require excluding categories of visitors. One instance of a major misconduct, such as drug smuggling, that occurs during or is associated with a visit, or

one criminal act that occurs during a visit, is a basis for imposition of a permanent visiting restriction under the administrative rule and policy. n15 Defendants have adequate methods to prevent and detect drug smuggling, including the use of non-contact visits and a number of steps taken in 1995, such as implementation of the approved visitor lists, a prohibition on visitors being on multiple visitor lists if they are not immediate family, restrictions on the conduct of visits, and more intrusive searches of visitors. n16 Both prisoners and visitors involved in smuggling are subject to criminal prosecution. n17 Limiting minor siblings, nieces and nephews to non-contact visits eliminates the opportunity to smuggle in any event. n18

n15 *See* McGinnis, Tr. 8, p. 51; Bolden, Tr. 4, pp. 62-63.

n16 *See* McGinnis, Tr. 8, pp. 50-51; Bolden Tr. 3, pp. 67-68; Mintzes, Tr. 5, pp. 106-107; Kupers, Tr. 7, pp. 4-5.

n17 MICH. COMP. LAWS ANN. § 800.281 (West 1998); Pls.' Ex. 40 -- No. 180393, Jon Weaver, p. 338, No. 186296, William Brussow, pp. 395-96.

n18 *See* Mintzes, Tr. 5, p. 133 (non-contact visitation essentially eliminates the ability of anyone to pass anything to the prisoners); Bolden, Tr. 4, pp. 65-66 (although there is a "possibility," Deputy Director has no proof that smuggling occurs on non-contact visits because of this possibility); Bolden, Tr. 3, pp 45-46 (doesn't know of any visitor who came for a non-contact visit that was involved in smuggling; changes of smuggling at Level 5 and 6 facilities that have only non-contact visiting are minimal); VanOchten, Tr. 1, p. 77 (limiting former prisoners to non-contact visits should eliminate the opportunity to smuggle); Yukins, Tr. 6, p. 45 (in 11 years,

Warden Yukins never had an incident of a child smuggling on a non-contact visit).

IV. Non-Contact Visits

Although contact visits may be more desirable from the perspective of prisoners and their families, if contact visits are not permitted, then the visual contact that occurs on non-contact visits is crucial to the family member's ability to reassure themselves about a loved one's welfare. *See* Kupers, Tr. 6, pp. 141-42. Family members who had experience with non-contact visits found them to be a critical means of maintaining relationships because they allow for face-to-face contact and spontaneous conversation. n19

n19 *See* Hendricks, Tr. 2, pp. 86-87 (despite glass dividers and use of phone to talk, non-contact visits were pleasant, eventually you forgot you were at a jail and just talked, visits prevented incarceration from breaking up family); Shier, Tr. 2, p. 121 (younger children were "thrilled" to see older brother through glass at county jail because it alleviated their anxiety about his welfare); Benejam, Tr. 2, pp. 46, 64 (mother who visited son non-contact for six months would bring young daughters and grandchildren for non-contact visits "immediately" if she could).

All facilities currently have either built-in or portable non-contact visiting booths available. *See* Bolden, Tr. 3, pp. 29-30. Portable booths are built by prison industries and a warden who needed more could afford to purchase them. n20 Contact and non-contact visitors are processed in exactly the same way. *See* Benejam, Tr. 2, pp. 40-41. Portable booths can be placed in the contact visiting room at whichever spot allows for the most effective surveillance by officers and cameras. n21

n20 *See* Bolden, Tr. 3, p. 30 (made by prison industries), p. 55 (Defendants' current budget is over $ 1.5 billion); Jones, Tr. 9, pp. 54-55 (warden with institutional budget of $ 41 million could afford to purchase a few more portable booths if needed).

n21 *See* Bolden, Tr. 3, p. 30 (booths can be moved in and out of visiting rooms); Mintzes, Tr. 5, pp. 112-13 (each institution determines placement of non-contact booths that is best for security).

Given the 50% reduction in visiting volume and the fact that many facilities had no volume problems to begin with, it is highly unlikely that restoring non-contact visits to a limited group of people, who would have to fit on a prisoner's approved list in any event, would substantially burden Defendants' staff and resources. If Defendant finds that non-contact visits become burdensome at any particular facility or group of facilities, the Deputy Director can adjust visiting hours or take any of the other steps that are within his authority to control visits without excluding these categories of visitors altogether. n22 While Defendants cannot be required to restore minor siblings, nieces and nephews to contact visitation, Defendants could amend R 791.6609 to permit that option if it decided that contact visits for these groups were more workable after all. *See* Pls.' Ex. 56, Public Statement of RPA Denise Quarles.

n22 *See* Bolden, Tr. 3, p. 66 (policy grants him authority to control visiting hours, number of visits allowed, and number of visitors per day); Pls.' Ex. 2A, PD 05.03.140, p. 4, P U.

To whatever extent Defendants' concerns about minors are valid, non-contact visits were designed specifically to be an alternative to contact visits where security concerns exist.

Visits with whole categories of individuals should not be prohibited altogether absent a reasonable basis for believing that non-contact visits will not address security concerns adequately. Other than the Higdon incident, which occurred in a contact situation, involved a very young unrelated child, and could have been prevented under existing security rules, there was no evidence presented of a problem which would justify the exclusion of whole categories of minor children from visiting. n23 The potential risk that someone will act inappropriately toward a visitor does not justify excluding an entire group of visitors. *See* Mintzes, Tr. 5, pp. 133-34. The fact that drugs can be left by visitors in bathrooms or outside buildings for pick-up by a prisoner does not logically justify denying non-contact visits by minor children. *Cf.* Bolden, Tr. 4, p. 29 (non-contact visitation does not eliminate the threat of smuggling). Concern that prisoners' girlfriends used to bring a lot of children who were unrelated to prisoners for lengthy visits does not logically justify prohibiting visits by prisoners' siblings, nieces and nephews. *Cf.* Bolden, Tr. 4, pp. 26-27.

n23 *See* Pls.' Ex. 39, Defs.' Resp. to Disc. Req.

V. Other Exclusions

A. Former Prisoners

The challenged regulations also exclude from visitation former prisoners who are not immediate family. The stated penological interests in this exclusion do not relate to volume, but rather to the potential for illegal or disruptive activity occasioned by such visits. However, because each prisoner is now limited to ten non-family visitors, each of whom must be screened and approved in advance of any visit, the Department has the ability to screen out any problematic former prisoner on an individual basis. Moreover, the limitation of former prisoner

visits to a non-contact setting virtually eliminates the possibility of smuggling. n24

n24 *See* VanOchten, Tr. 1, pp. 76-77.

There are many instances in which exclusion of former prisoners creates significant hardship on friends and family, including instances where former prisoners have completely rehabilitated and have served as social workers or governmental ombudsman, n25 and instances where an in-law's prior record has made it impossible for immediate family to visit. n26

n25 *See* Trudeau, Tr. 4, pp. 92-103.

n26 *See* Wilson, Tr. 4, pp. 104-109 (witness was incarcerated and daughter, who lived in another state, planned visit with fiance, but was unable to visit because fiance, who was former prisoner, was excluded from visitation; daughter was disabled and could not travel on her own).

B. Minor Children of Prisoners Whose Parental Rights Have Been Terminated

When the Department eliminated from visits any child of a prisoner whose parental rights had been terminated, it did not consider that some prisoners voluntarily terminate parental rights to provide adoptive homes for their children. n27 In addition, Plaintiffs submitted substantial unrefuted evidence to establish that contact between parent and child is an important ongoing need for both parent and child regardless of the basis for the termination of parental rights. n28 Moreover, any concern for the safety and security of the child during a visit would be accommodated by limiting these visits to a non-contact setting. n29

n27 *See* VanOchten, Tr. 1, pp. 59-63.

n28 *See* Kupers, Tr. 6, pp. 132-134, 147-148; Scarnecchia, Tr. 1, pp. 188-201, Tr. 2, p. 20, 23; Mintzes, Tr. 5, pp. 98-99.

n29 *See* VanOchten, Tr. 1, p. 77.

C. Minor Children Must Be Accompanied By Immediate Family Members or Guardian

The stated penological concern for requiring that a minor child be accompanied by an immediate family member or guardian is the safety and security of the child. Former practice permitted a child to be accompanied by any responsible adult, designated by power of attorney. Deputy Director Bolden testified that powers of attorney were too easy to forge and that the guardianship presented more protection for the child and for the system.

According to the unrefuted evidence submitted by Plaintiffs, however, many prisoners, especially women, do not have another immediate family member available to bring their child to visit. n30 In addition, a guardianship is a complex legal responsibility and procedure, with many risks to the future legal relationship of the parent to her child, and beyond the resources of many prisoners. n31 There was no evidence establishing any instance of forgery of a power of attorney; and the pre-screening procedures established by Defendants appear completely adequate to protect against the abuse of a system utilizing a power of attorney. Finally, again, if concern for the safety of the child is an issue because the accompanying adult might not exercise the same degree of oversight and responsibility as a parent or guardian, the restriction to non-contact visits would provide adequate safety and security.

n30 *See* VanOchten, Tr. 1, pp. 85-89.

n31 *See* Scarnecchia, Tr. 1, pp. 188-91.

VI. Permanent Ban on Visits Based on Two Substantive Abuse Misconducts

A. Penological Interest

Also in 1995, the Department implemented regulations which impose a permanent ban on visitation for any prisoner convicted of two or more substance abuse misconducts. The regulations state as follows:

> BBB. Except as set forth in Paragraph EEE, the Director may permanently restrict all visits for a prisoner who is convicted or found guilty of any of the following:
>
> 1. A felony or misdemeanor that occurred during a visit.
>
> 2. A major misconduct violation that occurred during a visit or was associated with a visit.
>
> 3. Escape, attempted escape or conspiracy to escape.
>
> 4. Two or more violations of the major misconduct charge of substance abuse.
>
> CCC. If a prisoner has been found guilty of the conduct set forth in Paragraph BBB, the warden shall recommend that all visits be permanently restricted. S/he shall submit the recommendation, along with all

supporting documentation, to the appropriate RPA. The RPA shall review and forward the recommendation to the CFA Deputy Director for review. If the CFA Deputy Director agrees that the restriction is warranted, the recommendation shall be submitted to the Director for a final determination.

DDD. The CFA Deputy Director or designee shall ensure that the warden is notified of the Director's determination and that any restriction is entered into the computerized tracking system. The warden shall ensure the prisoner is notified of the Director's determination.

EEE. A prisoner whose visits have been permanently restricted shall be allowed visits only with attorneys or his/her representative, qualified clergy and staff from the Office of Legislative Corrections Ombudsman in the manner set forth in this policy.

FFF. The Director may remove a restriction upon written request of the warden or the restricted prisoner, subject to the following:

1. The restriction shall not be removed if it is based on a felony or misdemeanor that occurred during a visit or if it is based on an escape, attempted escape or conspiracy to escape associated with a visit.

2. The restriction shall not be considered for removal until at least two years after imposition of the restriction by the Director if it is based on two or more violations of the major misconduct charge of substance abuse if one or both of the charges were for possession or use of any

prohibited substance other than alcohol, or if one or both of the charges were for refusal to submit to substance abuse testing.

3. The restriction shall not be considered for removal until at least six months after imposition of the restriction by the Director it if is based on a major misconduct that occurred during a visit or was associated with a visit, if it is based on an escape, attempted escape or conspiracy to escape not associated with a visit, or if it is based on two or more violations of the major misconduct charge of substance abuse if the charges were for possession or use of an alcoholic beverage.

GGG. If eligible for removal of the restriction based on the criteria set forth above, a prisoner may request removal of the restriction by sending a written request to the warden of the facility where the prisoner is housed.

1. If the prisoner is eligible for removal of the restriction, the warden shall submit his/her written recommendation, along with the prisoner's written request if one was submitted, to the appropriate RPA. The RPA shall review and forward the documentation to the CFA Deputy Director. The CFA Deputy Director shall review the request and make a written recommendation to the Director for a final determination. If denied, the Director shall determine when the prisoner may reapply for removal of the restriction.

> 2. If the prisoner is not eligible for removal of the restriction, the warden or designee shall notify the prisoner in writing of his/her ineligibility and if/when the prisoner will be eligible to apply for removal.

Defs.' Ex. 4; MDOC Policy Directive 05.03.140 (01/12/98), based on Administrative Rules 791.6607-6614, as amended 1995.

No evidence was introduced to establish that any other State has a provision similar to Michigan's permanent restriction, either in duration or in substantive content. Defendant submitted the policies of Florida, Ohio, Indiana, Pennsylvania, and New York, which were represented to have policies "similar to Michigan." *See* Defs.' Ex. 9. A review of these policies shows that they are not nearly as harsh.

Florida utilizes a three month suspension if an inmate refuses or is removed from a primary program due to "negative behavior" or is rated "unsatisfactory" for the work/program performance rating or security assessment. Further, Florida imposes a two year suspension for visit-related misconduct, which includes conduct such as engaging in sexual misconduct or possessing drugs during a visit. Only if a dangerous weapon is involved, however, is a permanent suspension imposed. *See* Defs.' Ex. 9, Florida Dept. of Corrections, Inmate Visitation, pp. 20-22. n32

n32 Florida's rules also state:

> (c) Visiting privileges will be suspended for criminal activity, serious rule violations, repeated visiting rule or procedure infractions or any security breach. When an incident occurs the Duty Warden will ensure a

> comprehensive incident report is completed immediately following the incident. The Warden will review a report of the facts. Based on the report, the Warden, Assistant Warden, or Duty Warden will submit a report, with recommendations, to CVA for final approval. CVA will notify the visitor and inmate of the final decision.

Defs.' Ex. 9, Florida Dept. of Corrections, Inmate Visitation, p. 20 § 10(c).

> It is unclear whether this provision relates to a prisoner or a visitor because of the final sentence. Further, this provision requires various procedural safeguards including a comprehensive incident report.

Ohio permits suspensions of visitation for a visit-related infraction (i.e. contraband found on the visitor). However, the inmate must be given notice of the time period of suspension. Further, visits may be suspended up to two months if an inmate tests positive for or is in possession of illegal drugs, or refuses to comply with a drug screen. If a second offense occurs, however, visitation may be suspended up to six months. *See* Defs.' Ex. 9, Ohio Dept. of Rehabilitation & Correction, Inmate Visitation, pp. 6-7.

Indiana imposes a temporary suspension for a variety of infractions. No suspension lasts more than thirty days. Written notice to the prisoner is required stating the reasons, duration, and right to appeal. Furthermore, contact visits may be denied for a variety of offenses such as possession of contraband, but the inmate may still have non-contact visits. A denial of contact visits also requires notice. *See* Defs.' Ex. 9, Indiana Dept. of Corrections, Offender Visitation, pp. 8-9.

Pennsylvania permits suspension of visitation for drug infractions, but the suspension is limited to contact visits. Moreover, "restriction of visiting privileges will not be used as a disciplinary measure for unrelated facility rule infraction." Defs.' Ex. 9, Pennsylvania Dept. of Corrections, Inmate Visiting Privileges, pp. 14-15.

New York permits suspension of contact visiting as punishment for visit-related misconduct, but permits non-contact visitation under these circumstances. *See* Defs.' Ex. 9, New York Dept. of Correctional Services, Inmate Visitor Program, pp. 7-14.

Thus, no other State imposes a permanent restriction on visitation other than Florida's restriction if a prisoner is involved with a dangerous weapon in a visiting situation. n33

n33 Plaintiffs' expert Terry Kupers testified that he had reviewed visiting regulations in fourteen other prison systems, non of which had restrictions similar to those imposed by the Michigan Department of Corrections. *See* Kupers, Tr. 6, pp. 175-76.

Former Director McGinnis testified that Michigan's permanent restriction for two substance abuse misconducts was developed because he was committed to reducing drug use within the prison system, and that he was searching for a way to implement a zero tolerance policy. He stated as follows:

> Well, based on my experience, and one of the biggest problems, one of the biggest problems that prison systems face is the introduction of drugs. It creates a tremendous amount of other issues within the prison environment, violence probably being the most predominant one.

> It creates situations of trafficking for drugs, pressuring for money, but in my experience, it almost always resulted in some form of violence, eventually, in a prison environment. It creates a very dangerous atmosphere in prisons, and that's why there's so much emphasis placed on it.

Tr. 8, p. 34.

> I think [the policy] sent a clear message that we were interested in zero tolerance as it involved substance abuse in prison. Did I think it was severely harsh? No.

Tr. 8, p. 62.

This testimony was amplified by Deputy Director Bolden, who testified that "our former director and I concurred, felt that we just had to take a tougher stand with regard to trying to get a handle on what is a very, very serious problem, not only in prison, but in our communities." Tr. 4, p. 51. According to both McGinnis and Bolden, the use of illegal substances in the prison system compromises security and discipline. Aggressive action was believed to be necessary in this area.

Bolden acknowledged that substance abuse misconducts trigger other automatic punishment within the prison system including loss of good time and reclassification of a prisoner's security level. Others in the MDOC, including Marjorie VanOchten, testified that the permanent ban on visitation was not tied to concerns about smuggling which occurred during the visitation process; rather, visits were chosen as the vehicle of punishment because they are very important to prisoners -- and loss of visits would be a significant deprivation.

B. Procedural Issues

There have been many procedural problems associated with the implementation of the permanent ban on visitation. First, although Department witnesses testified that the new policy was made available to prisoners at the time of implementation, Plaintiffs introduced substantial evidence to establish that notice was spotty and inconsistent. n34

n34 *See* Defs.' Ex. 1A; McGinnis, Tr. 8, pp. 46-47; Staton, Tr. 4, p. 139 (woman prisoner saw no posting re: permanent bans). No policy directive was issued until 1998, three years after application of the ban had begun in August 1995, and restriction criteria were continually evolving. *See* VanOchten, Tr. 1, pp. 38-40; Pls.' Ex. 5, DOM 1995-58/DOM 1996-42; McGinnis, Tr. 8, p. 47; Bolden, Tr. 3, p. 97 (possible criteria still being discussed in February 1996); Pls.' Ex. 23 (4/27/96) McKeon memo to EPT; Pls.' Ex. 27 (7/31/96 Quarles memo to Gidley).

In addition, although the implementing language suggests discretion in the imposition of the ban, there are no written criteria to guide the Director's decision. n35 Section CCC of the policy directive states that if a prisoner has two substance abuse misconducts, "the warden shall recommend that all visits be permanently restricted." The warden is required to submit this recommendation, with all supporting documents, to the appropriate regional prison administrator (RPA) who, in turn, is to review the recommendation and forward it to the Correctional Facilities Administration (CFA) Deputy Director. "If the CFA Deputy Director agrees that the restriction is warranted, the recommendation shall be submitted to the Director for a final determination." Defs.' Ex. 4 P CCC. Thus, the Director has absolute discretion to impose or not impose the restriction on any prisoner who has two substance abuse tickets. *See* Bolden, Tr. 3, p. 127. The CFA Deputy Director has absolute discretion to prevent a restriction from being imposed by not forwarding a recommendation to the Director.

But see Bolden, Tr. 3, p. 127 (Deputy Director does not believe he has authority to not forward recommendation). It was understood when the new rule was adopted that a permanent visiting restriction would be imposed automatically whenever a prisoner received two substance abuse misconducts and that the director would not in fact exercise discretion on a case by case basis. *See* VanOchten, Tr. 1, pp. 103-04, 106. Although Deputy Director Bolden and Marjorie VanOchten both testified that the ban is supposed to be imposed automatically after two substance abuse misconducts, the actual practice has been inconsistent.

n35 *See* Pls.' Ex. 2, PD 05, 03, 140. §§ BBB, CCC.

Over a period of nearly five years, 1715 of 4188, i.e. 41 %, of the prisoners who had two substance abuse misconducts actually received permanent restrictions. By year, the disparity ranged from 20.9% in 1996 to 59.1% in 1999. The evidence does not show to what extent this is because: a) the wardens are not recommending restrictions in all cases where they are required by policy to do so; b) the Deputy Director is exercising his discretion not to forward recommendations to the Director on some unknown and unreviewable basis; or c) the Director is deciding not to impose restrictions in a proportion of the eligible cases on some unknown and unreviewable basis. *See* Pls.' Ex. 51; Creekmore, Tr. 5, pp. 48-50. Although a warden's recommendation for restriction is supposed to be mandatory after two tickets, wardens do not in fact make these requests automatically. *See, e.g.*, Pls.' Ex. 40: No. 169509, Michael Willis, p. 274 (has misconducts at SMI in 11/95 and 1/96, but no request for restriction until 1/97, at MBP). Some prisoners accumulate more than two misconducts before a recommendation to restrict is made. n36

n36 *See, e.g.*, Pls.' Ex. 40: No. 148325, Quincy Leonard, p. 133 (7 alcohol misconducts, all at SMI, from

12/15/95 -8/9/96, restriction request by SMI on 10/21/96.); No. 161934, Jeff Miller, p. 221 (3 misconducts in Oct/Nov 1995 at WCF, 8/96 and 6/97 alcohol misconducts at SRF, restriction request by SRF on 6/11/97); No. 226669, Gregory Winters, p. 607 (5 drug test refusals at MBP from 7/09/96-9/10/96, date of restriction request by MBP unclear but restriction imposed 11/1/96); No. 247161, David Tyran, p. 760-61 (3 alcohol tickets at MTU from 11/96-1/97, 2 marijuana tickets at MRF in 4/97, restriction request by MRF in 5/97); Yukins, Tr. 6, pp. 62-63, 65-67, 70-75; Pls.' Exs. 58, 59, 60, 61, 62.

Even more troublesome, the time lapse between the second misconduct and the imposition of the permanent restriction may take many months or even years, during which time a prisoner may be misconduct free. The average time between the guilty finding on the second substance abuse misconduct and imposition of the permanent visiting restriction has increased each year and is now nearly seven months. *See* Pls.' Ex. 47; Creekmore, Tr. 5, p. 57. Some prisoners who have two tickets do not receive a permanent restriction until three years after their last guilty finding. n37 Often the restriction is not imposed until the prisoner is transferred and a request is made by the warden at the new facility. n38 Deputy Director Bolden testified that he did not find this time delay to be problematic, because it is important that prisoners recognize the certainty of punishment for their misconduct. *See* Tr. 3, p. 139-140. n39

n37 *See* Brewer, Tr. 7, p. 107 (restriction imposed when prisoner request to change visitor list prompted file review); *see also* Pls.' Ex. 40: No. 203124, David Brewer, p. 552 (1 misconduct at CBI in 10/95, 2 misconducts at JCF in 1/96 and 3/96, restriction request by JCF on 12/21/98, restriction imposed 2/99).

n38 *See, e.g.*, Pls.' Ex. 40: No. 104922, R. G. Stroman, p. 001 (restriction requested by JCF 3 1/2 years after last guilty finding at SMN, over RPA's objection); No. 173758, Lee Arthur Love, p. 300 (restriction requested by JCF 3 1/4 years after last guilty finding at DRF); No. 193320, Cardell Sanders, p. 468 (restriction requested by JCF over 3 years after last guilty finding at DRF, over RPA's objection); No. 201399, Andrew Broadnax, p. 545(restriction requested by JCF over 2 1/2 years after last guilty finding at SMN, over RPA's objection), No. 245951, Joseph Hopkins, p. 754 (restriction requested by JCF 2 years after last guilty finding at ARF).

n39 There are a number of other procedural problems as well. Once the underlying misconducts are established, the prisoner is not entitled to a hearing on the imposition of the permanent ban. Prisoners cannot challenge the imposition of the ban based on unusual or extenuating circumstance or for any other reason. In some instances, the ban has been imposed for two separate instances which were actually only hours apart and part of the same patterns of behavior. *See, e.g.*, Pls.' Ex. 40: No. 178707, Napoleon Wells, p. 324 (two misconducts for possession of marijuana issued within 13 minutes during a continuing incident, one for packet thrown on ground and one for packet found in ensuing strip search); No. 238324, Michael Couch, p. 717, 720 (two misconducts, 75 minutes apart, for possessing marijuana and a drug test showing use of marijuana); No. 240505, Lawrence White, p. 734 (two misconducts within ten minutes for packet of marijuana found during search of prisoner's person and three packets found during ensuing search of cell); Bolden, Tr. 3, pp. 148-49 (concerned about unfairness of situation like Wells, supra); Withrow, Tr. 8, pp. 153-54 (had no choice but to refer White, supra, for permanent restriction).

In addition, permanent restrictions have been imposed where the underlying conduct was relatively minor or there were extenuating circumstances. *See, e.g.*, Pls.' Ex. 40: No. 141963, Marcos Martinez, p. 105 (alcohol ticket for making "spud juice" to share with friends on New Year's); No. 178579, Gerald Gaines, p. 320 (used marijuana because mother had recently died and "was looking for escape); No. 162312, Merion Johnson, p. 238 (used marijuana to "ease the hurt" after mother died); No. 179745, Jerold Terrell, p. 334 (just had cancer operation and accepted offer of drugs from another prisoner); No. 192100, Randy Cavallo, p. 441 (refusal to wear sweat patch because apparent allergic reaction causes itching/tested negative on numerous urine tests); No. 234985, Andre Fountain, p. 692B (misconduct was "accomplice to substance abuse: for failing to tell staff that his roommate had alcohol); No. 128217, Wendall Young, p. 061, 66-67 (test refusal misconduct for 51 year old man on several meds who could not urinate within one hour allotted); No. 141352, William Irby, pp. 095, 97 (test refusal misconduct for 47 year old man on medication for prostrate condition who could not urinate within one hour allotted/ purpose of meds was to aid urination); No. 196461, Clara Wilson, pp. 515, 520-21 (test refusal misconduct for woman who could only produce small urine samples within one hour allotted and was not allowed to combine them); Clark, Tr. 4, pp. 113-14 (found guilty of drug test refusal although inability to urinate is side effect of medication); Bolden, Tr. 3, p. 163 (deputy director testified some restrictions are imposed unfairly due to "sloppy" staff work; is "not very proud" of some cases contained in Pls.' Ex. 40); Yukins, Tr. 6, pp. 76-78 (warden has no choice but to recommend permanent restriction in a case like *Wilson, supra,* irrespective of the underlying conduct); Kupers, Tr. 7, pp. 19-22 (a number

of permanent bans were imposed for drug test refusals on people who were unable to urinate because of medications or medical conditions). Permanent restrictions have been imposed where the prisoner is known to have a history of drug addiction, alcoholism, or mental illness that would directly relate to the misconduct - regardless of placement or progress in treatment. *See, e.g.*, Pls.' Ex. 40: No. 172502, Jeffrey Carey, pp. 293, 298 (mentally ill prisoner found guilty of possessing restricted medication for spitting out prescribed medication he was authorized to refuse); No. 245951, Joseph Hopkins, pp.754, 756 (mentally ill prisoner found guilty of possessing medication he had kept instead of taking); No. 136547, Troy Grisson, pp. 078, 80 (marijuana misconducts by prisoner whose file shows history of drug problems before incarceration); No. 170623, James Englemann, pp. 281, 283 (drug test failures by prisoner whose file shows history of substance abuse since age 11); Kupers, Tr. 7, pp. 12-15 (placing Hopkins, supra and Carey, supra on permanent restriction for reacting to their medication serves no purpose and is counter-productive); Bolden, Tr. 4, pp. 85-88 ("legitimate argument could be made" that permanent ban should not have been imposed on Carey, supra); Southwick, Tr. 9, pp. 152-53 (in providing information to deputy director, administrative assistant does not check on whether prisoners are mentally ill, or whether they have sought or received substance abuse treatment).

Another significant problem with the permanent ban on visitation is that there are no standards for removing the restriction. Although the ban is characterized as "permanent," the administrative rule provides that the director may grant reconsideration and removal of the restriction, as follows:

> The restriction shall not be considered for removal until at least two years after imposition of the restriction by the Director if it is based on two or more violations of the major misconduct charge of substance abuse if one or both of the charges were for possession or use of any prohibited substance other than alcohol, or if one or both of the charges were for refusal to submit to substance abuse testing.

Defs.' Ex. 4, § FFF(2).

As is clear from the rule, however, and as Mr. Bolden and Ms. VanOchten confirmed, the two-year time frame set forth in the rule is a threshold, not a cap. Many prisoners are restricted beyond the two years, and Plaintiffs' exhibits establish that there are no ascertainable criteria for the restoration of visiting privileges. The Director has absolute discretion to grant or deny a request for reinstatement, and has denied requests even where the prisoner has been misconduct free for two years. In many instances, denial of visitation reinstatement is not reported to the prisoner in writing, nor is the prisoner told what criteria he must meet to again be able to receive visitors.

When questioned about the standards and the time period for lifting the ban, Mr. Bolden testified:

> Q. Mr. Bolden, this policy does not include any statement that a prisoner must remain misconduct free in order to be eligible for restoration of visitation rights, does it?
>
> A. No, but it doesn't say anything else either. What I look at when they send them up to me for restoration, I look at what their misconducts record has been, I look at whether or not they've been involved in programs, I look at whether or not they've been doing

the things that RNGC recommended they do. The policy clearly gives me the ability to make a decision, make a determination. Maybe it should be more clearly spelled out. Unfortunately, it's not.

Q. So you agree that in many cases, restoration is expressly denied because the prisoner has one or more nonsubstance abuse major misconducts since the restriction was imposed?

A. There could be a continuation of that if there is additional misconducts, yes.

Q. So you are in fact applying the criteria that a prisoner remain misconduct free in order to get the restrictions reinstated?

A. No, I don't think necessarily misconduct free. I'm saying major misconducts, and typically more than one. A prisoner may have acquired a series of minor misconducts, or some nonserious major misconducts. It wouldn't prohibit me from making a recommendation to the director.

Tr. 3, pp. 156-57.

Q. When it comes to restoring the visits, isn't it the case that you often do not forward the request to the director and in fact send it back, deny it for reasons of your own and send it back to the warden?

A. That's true, yes.

Q. And does it not also often occur that when a restoration is denied, you do not, in the document that

goes to the prisoner, advise the prisoner when they could next apply or the terms by which they must --

A. We try to. There's a conscious effort in my office to do that. I'm not going to sit here under oath and say it happens every time, but I have asked the folks in my office that do this in my behalf, give the prisoner a date to shoot for.

Q. So are you saying it would not surprise you if in fact prisoners are told to stay misconduct free without an end date?

A. It shouldn't be that way, but I'm not going to be surprised that you might find some that are that way, but I think you need to give the prisoner a target or a goal to work for, and I know my intent when they go out, that we give a prisoner a date to look forward to; I'll look at it in six months or three months or whatever amount of time.

Tr. 3, pp. 159-60.

Q. Now, in terms of the reapplication periods when you do specify them, it appears that they range anywhere from six months to 12 months, and sometimes up to 24 months. Is there some criteria that you can point to in making these various determinations, or is it pretty much a file-by-file situation?

A. I think it has to be a file-by-file situation. If an individual is making progress, trying to improve their behavior, and I see some progress looking in the file, I may say six months. I may say 12 months for somebody else who is slick and doesn't get caught, but

for the guy that constantly gets in trouble and gets misconducts on a regular basis, for that person to go two months, three months, six months, he or she has really worked at it, and so you give them a little bit more of a carrot versus a guy that is involved in drugs and you never catch him.

Q. How do you determine somebody is slick by the misconduct reports?

A. Well, you don't necessarily -- you look at their record. A lot of these guys I know that are involved in the drug business and that get misconducts for narcotics.

Q. Do you sometimes discuss the prisoner with the warden before you make a ruling?

A. I have, but not on a regular basis. I would be dishonest if I said that I have on a few cases, I've talked to the wardens or I've talked to someone about a prisoner, and I've been around for 27 years, and I know a lot of prisoners in the system.

Tr. 3, pp. 161-62.

Despite the timing criteria of subsection FFF, some prisoners restricted for a mixture of alcohol and non-alcohol substance misconducts are considered for restoration after six months, while others are required to wait two years. n40 Although subsection FFF places the burden for requesting restoration on the prisoner, there is no requirement that prisoners be notified of when, how, and on what basis restoration may be requested, and they often do not, in fact, have this information. n41 The actual practice of requesting restoration is confusing and unclear. In some cases, review of a

permanent restriction is apparently initiated by the central office. *See* Pls.' Ex. 40: No. 159580, Keith Young, p. 177 (warden conducts six month review in response to e-mail from Deputy Director's staff). Although in many cases the director's restriction memo affirmatively states, in bold type: "I will review this case in six months", this review did not in fact routinely occur. n42 Although subsection GGG says that when timing criteria have been met wardens must submit prisoner requests for restoration to the Deputy Director though the RPA, Defendants advise wardens not to forward requests unless the wardens are recommending reinstatement, thus effectively putting the restoration decision in the wardens' hands. n43 Although subsection GGG says the Deputy Director is to make a written recommendation regarding restoration requests to the Director, and the Director is responsible for the final decision, in fact the Deputy Director regularly advises wardens that he is not forwarding requests to the Director and denies restoration for reasons of his own. n44 Although subsection GGG says that when restoration is denied, the Director is to determine when the prisoner may reapply, in fact the Deputy Director regularly denies restoration without specifying a next application date. n45 When reapplication periods are specified, they range from six months to twelve months to twenty-four months, without any apparent uniform standard being applied. n46

n40 *Compare, e.g.*, Pls.' Ex. 40: No. 134352, David Purnell, p. 069 (one alcohol and one test refusal; Director's 11/4/97 restriction memo says: "I will review this case in six months."); No. 163852, Patrick Turner, p. 249 (two alcohol and one positive marijuana test; Director's 9/6/96 restriction memo says: "I review . . . in six months"); No. 169509, Michael Willis, p. 274 (one alcohol and one marijuana possession; Director's 2/10/97 restriction memo says: "I will review this case in six months.") with No. 128217, Wendell Young, p. 061 (one alcohol and one

urine test refusal, 4/5/99 permanent restriction); No. 141963, Marcos Martinez, p. 102 (one alcohol and one marijuana possession, 4/5/99 permanent restriction); Bolden, Tr. 3, pp. 149-50; Bowyer, Tr. 4, pp. 185-89, 192 and No. 191172, Harrison Bowyer, p. 408 (warden recommended restriction for 1996 and 1999 alcohol misconducts that would have allowed restoration in six months, but deputy director imposed permanent restriction on 2/3/00 for 1999 alcohol and 1997 restricted meds). Despite the timing criteria of § FFF, some prisoners who have only alcohol related misconducts are required to wait a year before requesting restoration instead of just six months. *See, e.g.*, Pls.' Ex. 40: No. 148325, Quincy Leonard, p. 131 (multiple alcohol tickets, Deputy Director recommends one year restriction, Director's 11/22/96 restriction memo says: "1 will review this case in twelve months"); No. 175338, David Byard, p. 307 (three alcohol tickets, Deputy Director recommends one year restriction, Director's 11/8/96 restriction memo says: "I will review this case in twelve months."); Bolden, Tr. 3, pp. 150-51.

n41 *See* McGinnis, Tr. 8, p. 70; Bolden, Tr. 3, pp. 156-57; Kupers, Tr. 6, p. 177; Bowyer, Tr. 4, p. 182 (prisoner notified by mail that visits were restricted had to write prison officials seeking information before being told restoration would not be considered for two years); Clark, Tr. 4, p. 115 (written notice of restriction said nothing about when or how it could be lifted); Staton, Tr. 4, pp. 139-40 (prisoner believed ban was permanent because given no information re: how to get it lifted).

n42 *See* No. 163852, Patrick Turner, p. 249; No. 169509, Michael Willis, p. 274; No. 258127, Rufus Neely, pp. 789, 792; No. 237134, Benjamin Atkins, pp. 693, 698; McGinnis, Tr. 8, pp. 67-70. Atkins is a particularly troubling case. The prisoner's restriction was supposed to

be reviewed (and rescinded) in June 1997. This review did not occur. Atkins, dying of AIDS, was hospitalized over the summer. His mother made numerous contacts with the Department to try to get Atkins' visits reinstated. By the time the Department got around to reviewing and reinstating the visits, Atkins had died.

n43 *See* Pls.' Ex. 40: No. 180393, Jon Weaver, p. 337 ("In all cases where Wardens do not recommend reinstatement, they need not notify Deputy Director Bolden."); No. 209803, James Risk, p. 580 ("You need not forward any requests to us unless the prisoner is eligible and you recommend reconsideration.").

n44 *See, e.g.*, Pls.' Ex. 40: No. 158018, Gregory Dudley, p. 167; No. 225182, Demond Heidelberg, p. 595; No. 239781, Julian Thurman, p. 725; No. 162312, Merion Johnson, p. 234; No. 238324, Joseph Van Buskirk, p. 745; Pls.' Ex. 1, R 791.6609(12); Bolden, Tr. 3, p. 159; Tr. 4, pp. 79-80.

n45 *See, e.g.*, Pls.' Ex. 40: No. 158018, Gregory Dudley, p. 167 (Dep. Director requires "further demonstration of misconduct free behavior" for unspecified time period, though prisoner is scheduled to parole in 50 days); No. 162312, Merion Johnson, p. 234 (where restriction had been in effect over two years and only intervening misconduct was 10 month old marijuana use, Dep. Director requires "further demonstration of misconduct free behavior for unspecified time period); No. 225182, Demond Heidelberg, p. 595 (further demonstration of misconduct free behavior required for unspecified time period); No. 239781, Julian Thurman, p. 725 (Dep. Director wants unspecified period of misconduct free behavior "before I will seek reinstatement of his privileges"); Bolden, Tr. 3, pp. 159-61.

n46 *See, e.g.*, Pls.' Ex. 40: No. 159580, Keith Young, p. 177 (prisoner already on restriction for 14 months who had two additional alcohol misconducts must remain misconduct free for 12 more months before Dep. Director will recommend restoration); No. 238324, Michael Couch, p. 706 (prisoner restricted on 3/12/98 who has "various" subsequent misconducts, including one for restricted meds, has restoration request denied on 5/15/00 by Dep. Director who say request may be resubmitted six months from then); No. 243518, Joseph Van Buskirk, p. 745 (prisoner who had four additional substance abuse misconducts after restriction, but before completing substance abuse treatment, is denied restoration eighteen months after last ticket for "poor adjustment"; may resubmit request in another six months); No. 249102, Brian Mixen, p. 776 (prisoner with six non-substance abuse misconducts during two years on restriction must be one year misconduct free from last ticket before restoration will be considered); No. 258127, Rufus Neely, p. 789 (prisoner who has one additional substance abuse misconduct during 22 months on restriction for two alcohol tickets must be misconduct free for two years from date of that misconduct); Bolden, Tr. 3, pp. 161-62 (prisoner who gets misconducts often will be given shorter reapplication period than prisoner "who is slick and doesn't get caught" but who deputy director personally believes is involved in drug business).

Of the 1576 prisoners placed on permanent restriction from August 1995 through December 1999, 1124 were still on restriction in May 2000. This included 72% of those restricted in 1995, 53% of those restricted in 1996, and 53% of those restricted in 1997. *See* Pls.' Ex. 50; Creekmore, Tr. 5, pp. 51-54. Twenty-four people had their visits restored in less than six months. *See* Pls.' Ex. 48. Of the 453 prisoners whose visits

were restored through 1999, 49.4% spent less than twenty-seven months on restriction and 50.6% spent twenty-seven months or more. *See* Pls.' Ex. 48; Creekmore Tr. 5, pp. 54-56. By May 2000, 149 prisoners had been on restriction for 3-1/2 years or longer. n47

n47 *See* Pls.' Ex. 50; *see, e.g.*, Pls.' Ex. 40: No. 110133, Charles Jackson, p. 007; No. 148325, Quincy Leonard, p. 131; No. 152829, Curtis Lewis, p. 142; No. 159580, Keith Young, p. 177; No. 163852, Patrick Turner, p. 249; No. 170633, James Englemann, p. 281; No. 175338, David Byard, p. 307; No. 178707, Napoleon Wells, p. 324; No. 193525, Richard Custard, p. 474; No. 220990, James Larry, p. 585; No. 225182, Demond Heidelberg, p. 595; No. 226669, Gregory Winters, p. 607.

C. Substantive Problems

In addition to the procedural problems related to the permanent ban, many substantive issues are also problematic.

Defendant originated and implemented the concept of using permanent visiting restrictions as a punishment for substance abuse as part of its zero tolerance philosophy, under which a single instance of substance abuse is defined as a problem. *See* VanOchten, Tr. 1, p. 95; McGinnis, Tr. 8, pp. 61-63; Yukins, Tr. 6, pp. 59-60; Caruso, Tr. 8, p. 101. The use of permanent visiting restrictions was not motivated by any Department-wide rise in substance abuse. In fact, random drug testing begun in the late 1980's had brought drug use down. *See* VanOchten, Tr. 1, pp. 98-99. Although Department officials testified that substance abuse by prisoners is a major problem because it can lead to violence and creates a dangerous atmosphere, the statistical evidence indicates that the incidence of prisoners abusing substances is "well below ten percent." Kupers, Tr. 7, pp. 38-39. Further, Defendants acknowledge that they did not

have enough treatment programs available to handle the prisoners battling substance abuse problems, and that their facilities were not able to provide specialized appropriate substance abuse treatment in many instances. *See* VanOchten, Tr. 1, pp. 96-97. There was no testimony regarding violence levels before or after permanent restrictions were introduced. *See, e.g.*, Caruso, Tr. 8, p. 96; Bolden, Tr. 4, p. 51. Mr. McGinnis acknowledged that he had testified in 1994 that Michigan prisons "were well managed, well controlled and had an absence of violence: and that violence was extremely low in Michigan compared to other states." McGinnis, Tr. 8, p. 52. Permanent visiting restrictions are not imposed for misconducts involving violence or threats of violence, even though Mr. McGinnis testified that there is "no acceptable level of violence" and that "the standard is that there will be no violence." McGinnis, Tr. 8, p. 74; *see* Benejam, Tr. 2, p. 64 (son just limited to non-contact visits while appealing misconduct finding for starting a riot).

Although several of Defendants' witnesses expressed their opinions that substance abuse went down after implementation of the permanent restriction penalty, no data was introduced regarding any changes in the actual amount of substance abuse that occurred, any changes in the quantity of substance abuse misconducts issued, nor the extent to which any changes that did occur might have other causes. n48 Plaintiffs' expert testified that although a high proportion of prisoners have substance abuse problems when they enter prison and after they leave it, substance abuse while in prison is not a large problem and does not warrant the massive injury caused by separating family members through permanent restrictions. *See* Kupers, Tr. 6, p. 171, Tr. 7, pp. 6-7.

n48 *See* Caruso, Tr. 8, pp. 87-89; Withrow, Tr. 8, p. 151 (has not studied extent of reduction and drug problems at Reformatory "was not terribly extensive prior

to these changes."); Jones, Tr. 9, pp. 36-38; McGinnis, Tr. 8, pp. 75-76 (former director could not say whether substance abuse misconducts went up or down).

In addition, the lack of standards and procedures for the restoration of visiting privileges has had a significant negative impact within the MDOC. Department officials indicated that restoration was denied for widely disparate reasons, depending on the identity of the decisionmaker. n49 Some people have had their visits restricted for well over two years despite recommendations for restoration from wardens. n50 Since wardens are given no explanation when their recommendations for restoration are rejected, they cannot explain the decisions to prisoners. n51

n49 *See* McGinnis, Tr. 8, p. 64 (type of drugs involved, "nature of the case"); Bolden, Tr. 3, p. 157 (misconduct history, program involvement, RNGC recommendations); Southwick, Tr. 9, pp. 140-41 (standards "more or less" in her head, include continued pattern of substance abuse or other disruptive behavior); Caruso, Tr. 8, pp. 94, 110 (lack of further substance abuse not enough, considers other misconduct, prisoner's full history); Jones, Tr. 9, pp. 35-36, 56 (in addition to being free of substance abuse misconducts, prisoner must demonstrate "extended period of positive behavior"; considers other major misconducts, refusals to participate in school or counseling, "how well they've done on their institutional assignment", "irresponsible behavior"); Langley, Tr. 9, pp. 79-80 (institutional behavior and substance abuse history; will not restore until at least one year after last substance abuse ticket); Yukins, Tr. 6, p. 82 (does not recommend restoration if "not comfortable" doing so).

n50 *See, e.g.*, Pls.' Ex. 40: No. 162312, Merion Johnson, p. 234 (prisoner restricted on 4/29/97 for refusing drug test and possession of marijuana remains on restriction despite 4/8/99 recommendation by warden to restore); No. 163852, Patrick Turner, p. 249 (wheelchair bound prisoner restricted on 9/6/96 for alcohol and marijuana use who is at Level 5 facility for being management problem and has lost phone privileges remains on restriction despite 9/23/97 recommendation from warden to restore because visits would be non-contact, might encourage compliance with institutional rules, and would afford family support); No. 249102, Brian Mixen, p. 776 (prisoner restricted on 1/15/97 for alcohol and marijuana use still on restriction despite 1/19/99 recommendation from Warden Caruso to restore because no more substance abuse misconducts after restriction); No. 243518, Joseph Van Buskirk (prisoner restricted on 10/8/97 for dirty urine and refusing drug test denied restoration despite positive recommendation from Warden Caruso, no misconducts for eighteen months, and completion of substance abuse treatment); Bolden, Tr. 3, pp. 151-52.

n51 *See* Withrow, Tr. 8, pp. 154-55; Yukins, Tr. 6, pp. 83-84. Unexplained disparate restoration decisions lead prisoners to feel they are being treated unfairly, which in turn causes anger, irritability, obsessive resentment and increased acting out. *See* Mintzes, Tr. 6, pp. 13-15; Kupers, Tr. 6, pp. 164-65.

Even more egregious, permanent restrictions for substance abuse have been converted sub rosa into a tool for general behavior management, where restrictions are routinely continued on the basis of behavior for which policy does not authorize a visiting restriction in the first instance. n52 Using non substance-abuse misconducts to extend a visiting ban

imposed for substance abuse is perceived by prisoners to be unfair and excessive, and several witnesses, including Plaintiffs' experts, testified that this procedure is counterproductive to the penological interests identified by Defendants. *See* Kupers, Tr. 7, pp. 16-18. The arbitrariness and unfairness of the permanent restriction process makes the trauma of the restriction harder to bear and actually increases the tendency to resort to medication or drugs. *See* Kupers, Tr. 6, pp. 178-79.

n52 *See, e.g.*, Pls.' Ex. 40: No. 158018, Gregory Dudley, pp. 167-69 (restoration denied to prisoner who had completed substance abuse treatment and had excellent work reports because of five subsequent tickets, including insolence, restricted meds, and three "out of place"); No. 225182, Demond Heidelberg, p. 595 (restoration denied to Level 5 prisoner with multiple subsequent misconducts, none related to substance abuse); No. 233162, David Wood, p. 692A (6 month restriction for two alcohol misconducts continued indefinitely after Warden Caruso recommends no restoration based on one misconduct for disobeying a direct order); No. 239781, Julian Thurman, p. 724 (restoration denied more than three years after restriction imposed based on eight subsequent misconducts, none for substance abuse); No. 249102, Brian Mixen, p. 776 (restoration denied at six month review because of one ticket for unauthorized occupation of a cell; restoration denied after two years based on total of six misconducts after restriction, none for substance abuse); No. 242794, Kenneth Pringle, p. 744A (6 month restriction for two alcohol misconducts continued for 6 months based on two non-substance abuse misconducts; Warden Caruso had recommended requiring one year misconduct free before reconsideration "since visiting is considered a privilege."); No. 263692, Jack Hodges, p. 799A (6 month restriction for two alcohol

misconducts continued for 6 months for three non-substance abuse misconducts; Warden Kapture had recommended no restoration until 6 months misconduct free and 6 months satisfactory work or school performance); Bolden, Tr. 3, pp. 157-58; Caruso, Tr. 8, p. 94 (permanent restriction is "powerful tool" in managing prisoners; will not restore visits unless prisoners are "behaving themselves").

CONCLUSIONS OF LAW

Visitation has been recognized by judges and criminal justice professionals as an important aspect of prison life, because it aids in rehabilitation, preserves the family unit, positively influences reintegration of prisoners into society, and decreases recidivism. As Justice Marshall observed in his dissent in *Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 465, 104 L. Ed. 2d 506, 109 S. Ct. 1904 (1989)* (Marshall, Brennan, Stevens, JJ., dissenting):

> Confinement without visitation "brings alienation and the longer the confinement the greater the alienation. There is little, if any, disagreement that the opportunity to be visited by friends and relatives is more beneficial to the confined person than any other form of communication."
>
> "Ample visitation rights are also important for the family and friends of the confined person. . . . Preservation of the family unit is important to the reintegration of the confined person and decreases the possibility of recidivism upon release. . . . Visitation has demonstrated positive effects on a confined person's ability to adjust to life while confined as well as his ability to adjust to life upon release. . . ."

Thompson, 490 U.S. at 468 (quoting National Conference of Commissioners on Uniform State Laws, Model Sentencing and Corrections Act § 4-115, Comment (1979)).

The United States Supreme Court acknowledged in *Thornburgh v. Abbott, 490 U.S. 401, 407, 104 L. Ed. 2d 459, 109 S. Ct. 1874 (1989)* that "access [to prisons] is essential . . . to families and friends of prisoners who seek to sustain relationships with them."

Notwithstanding the importance of visits, both to the prisoner and to the penological goal of rehabilitation, the experience of incarceration necessarily imposes limits and restrictions on a prisoner's interactions with persons beyond the prison walls. Some prisoners are housed in facilities which are far away from family and friends. The United States Supreme Court has held that:

> The fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment, which are implicit in incarceration. . . . Perhaps the most obvious of the First Amendment rights that are necessarily curtailed by confinement are those associational rights that the First Amendment protects outside of prison walls. The concept of incarceration itself entails a restriction on the freedom of inmates to associate with those outside the penal institution.

Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 125-26, 53 L. Ed. 2d 629, 97 S. Ct. 2532 (1977).

The First Amendment, which is applied to the States through the Fourteenth Amendment, protects the right of association in certain circumstances. U.S. CONST. amend. I; *see NAACP v. Alabama*, 357 U.S. 449, 2 L. Ed. 2d 1488, 78 S.

Ct. 1163 (1958). The Supreme Court has "noted two different sorts of 'freedom of association' that are protected by the United States Constitution:

> "Our decisions have referred to constitutionally protected 'freedom of association' in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment--speech, assembly, petition for the redress of grievances, and the exercise of religion.'"

City of Dallas v. Stanglin, 490 U.S. 19, 24, 104 L. Ed. 2d 18, 109 S. Ct. 1591 (1989) (quoting *Roberts v. United States Jaycees,* 468 U.S. 609, 617-18, 82 L. Ed. 2d 462, 104 S. Ct. 3244 (1984)).

As for the first line of decisions, "many courts have recognized liberty interests in familial relationship other than strictly parental ones." *Trujillo v. Board of County Commissioners of Santa Fe County,* 768 F.2d 1186, 1188 (10th Cir. 1985) (citations omitted). Further, the First Amendment and the Fourteenth Amendment protect the fundamental rights to establish and maintain family relationships and to make child-rearing decisions. *See Santosky v. Kramer,* 455 U.S. 745, 753, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982) (stating that natural parents have a fundamental liberty interest "in the care, custody, and management of their child"); *Moore v. City of*

East Cleveland, 431 U.S. 494, 505, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977) (stating that "ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition"); *Cleveland Board of Educ. v. LaFleur,* 414 U.S. 632, 639-40, 39 L. Ed. 2d 52, 94 S. Ct. 791 (1974); *Yoder v. Wisconsin,* 406 U.S. 205, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972); *Griswold v. Connecticut,* 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965); *Pierce v. Society of Sisters,* 268 U.S. 510, 69 L. Ed. 1070, 45 S. Ct. 571 (1925); *Meyer v. Nebraska,* 262 U.S. 390, 67 L. Ed. 1042, 43 S. Ct. 625 (1923). In addition, "the freedom of intimate association protects associational choice as well as biological connection. *Trujillo,* 768 F.2d at 1188 (citing *United States Jaycees,* 104 S. Ct. at 3249-51; *see generally* Karast, "*The Freedom of Intimate Association,*" 89 Yale L.J. 624 (1980)).

Both the prisoners themselves and their prospective visitors are entitled to the protection of these rights, always with the acknowledgment that the demands of the prison system may involve significant restriction. In fact, the Supreme Court has specifically stated that "inmates clearly retain protections afforded by the First Amendment. " *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 348, 96 L. Ed. 2d 282, 107 S. Ct. 2400 (1987) (citing *Pell v. Procunier,* 417 U.S. 817, 822, 41 L. Ed. 2d 495, 94 S. Ct. 2800 (1974)); *see Austin v. Hopper,* 15 F. Supp. 2d 1210, 1231-32 (M.D. Ala. 1998); but see *Long v. Norris,* 929 F.2d 1111, 1118 (6th Cir. 1991) (stating that "in the Sixth Circuit, we have not decided the degree to which prison inmates retain their freedom of association). "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner v. Safley,* 482 U.S. 78, 84, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987). Inmates "do not forfeit all constitutional protections by reason of their

conviction and confinement in prison." *Bell v. Wolfish,* 441 U.S. 520, 545, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979). n53

n53 Although this Court found in its earlier opinion that "no First Amendment rights of freedom of association exists for prisoners," *Bazzetta v. McGinnis,* 902 F. Supp. 765, 770 (E.D. Mich. 1995), that overly broad statement is not consistent with the Supreme Court precedent cited above. As Justice Frankfurter observed in *Henslee v. Union Planters National Bank & Trust Co.,* 335 U.S. 595, 600, 93 L. Ed. 259, 69 S. Ct. 290 (1949) (Frankfurter, J., dissenting), "wisdom too often never comes and so one ought not to reject it merely because it comes late." A better formulation of the law would be to state that the Sixth Circuit had not addressed "the degree to which prison inmates retain their freedom of association," *Long v. Norris,* 929 F.2d 1111, 1118 (6th Cir. 1991), and that the Court must use the *Turner* analysis to resolve those issues on specific cases. As the Sixth Circuit stated in its earlier decision in this case, "there is no inherent absolute right to contact visits with prisoners," and "a properly imposed ban on contact visits will survive claims of Due Process [and First Amendment] violation." *Bazzetta v. McGinnis*, 124 F.3d 774, 779 (6th Cir. 1997). These statements recognize the existence of constitutional rights related to visits although limited by the constraints of incarceration. Thus, the *Turner* analysis must be utilized to evaluate the legitimacy of the restrictions.

However, "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston,* 334 U.S. 266, 285, 92 L. Ed. 1356, 68 S. Ct. 1049 (1948), *overruled on other grounds by McCleskey v. Zant,* 499 U.S. 467, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991); *see Pell,* 417 U.S. at 822. "Limitations on the

exercise of constitutional rights arise both from the fact of incarceration and from valid penological objectives--including deterrence of crime, rehabilitation of prisoners, and institutional security." *O'Lone,* 482 U.S. at 348 (citations omitted). Accordingly, in the First Amendment context, "a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penologicial objectives of the corrections system." *Pell,* 417 U.S. at 822.

Therefore, in order to grant prison officials the appropriate deference in dealing with prison matters, the courts apply a reasonableness standard "when a prison regulation impinges on inmates' constitutional rights." *Turner,* 482 U.S. at 89. Accordingly, a regulation is valid if it is "reasonably related to legitimate penological interests." *Id.* In making this determination, a court must balance the following four factors:

1. whether a valid, rational connection between the prison regulation and the legitimate governmental interest exists;

2. whether there are alternative ways for the prisoner to exercise the implicated constitutional right;

3. what impact would accommodation of the implicated constitutional right have on the prison administration; and

4. whether the regulation is an exaggerated response to prison concerns.

Id.; see O'Lone, 482 U.S. at 342 (1987) (holding that prison regulations precluding certain religious services did not violate the First Amendment); *Jones v. North Carolina Prisoners'*

Labor Union, Inc., 433 U.S. 119, 53 L. Ed. 2d 629, 97 S. Ct. 2532 (1977) (rejecting the inmates' First Amendment challenge to the union meeting and solicitation restrictions as rationally related to the central objectives of prison administration); *Pell*, 417 U.S. at 817 (1974) (rejecting the inmates' First Amendment challenge to the ban on media interviews because the regulation prohibited only one means of communication); *Caraballo-Sandoval v. Honsted*, 35 F.3d 521, 525 (11th Cir. 1994) (stating that "as to the First Amendment claim, inmates do not have an absolute right to visitation, such privileges being subject to the prison authorities' discretion provided that the visitation policies meet legitimate penological objectives"); *Nicholson v. Choctaw County*, 498 F. Supp. 295 (S.D. Ala. 1980); *Laaman v. Helgemoe*, 437 F. Supp. 269, 320 (D. N.H. 1977) (holding that "a total denial of visitation or unreasonable restrictions on visitation privileges does implicate the First Amendment rights of any inmate").

In applying the *Turner* test, Defendants bear the burden of demonstrating that the challenged regulation is reasonably related to a valid penological objective. "[A] regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Turner*, 482 U.S. at 90.

Although the Sixth Circuit has emphasized that "problems of prison administration are peculiarly for resolution by prison authorities and their resolution should be accorded deference by the courts," *Bazzetta v. McGinnis*, 124 F.3d 774, 779 (6th Cir. 1997), the court has also cautioned that deference does not mean blind acceptance of the proffered rationales. *See Whitney v. Brown*, 882 F.2d 1068 (6th Cir. 1989). Thus, a State may not "arbitrarily deprive prisoners of all contact with family and friends." MICHAEL MUSHLIN, RIGHTS OF PRISONERS § 12.01 (2d ed. 1993).

The Sixth Circuit has held, in an earlier decision in the instant case, that the restrictions concerning minor children and former prisoners are constitutional in the context of contact visitation. *See Bazzetta*, 124 F.3d at 779. With respect to non-contact visits, however, the Sixth Circuit first held that "appellants err in their contention that the restrictions at issue apply to both contact and non-contact visits. A fair reading of the amendments makes it clear that they apply only to the former." *Id.* In a subsequent decision, the Court explicitly denied the MDOC request to extend the holding to the non-contact setting. *See Bazzetta v. McGinnis*, 133 F.3d 382, 384 (6th Cir. 1998). And indeed, the balance of the *Turner* factors appears to be quite different if one considers the non-contact environment.

The penological interests articulated by the Defendants with respect to the regulations affecting minor children and former prisoners are 1) preventing children from suffering physical and sexual abuse; 2) preventing children from being injured in the non-child-proofed visitation rooms; 3) preventing the smuggling of weapons, drugs or other contraband; and 4) reduction of overall volume so as to ease the overcrowding of visiting rooms and the administrative burden on prison staff.

As discussed above, Defendants made no attempt to quantify the number of minor children or former prisoners who would be excluded by the new regulations; defendant conceded that the number was probably small. Furthermore, the establishment of the visiting standards and the limited 10-visitor list for each prisoner had already reduced the volume of prison visitors by approximately 50%. Thus, there is no logical connection between the challenged regulations and the need to reduce volume.

With respect to the other articulated penological interests, the confinement of these excluded visitors to non-contact visits

would fully address any issue of abuse, potential injury or the opportunity for smuggling. Thus, there is no valid rational connection between the regulation which excludes minor siblings, nieces and nephews and former prisoners, from non-contact visitation -- and the governmental or penological interest motivating the rule.

Similarly, with respect to the restrictions on who may accompany a minor child and on the elimination of visits by children whose prisoner parents have had their rights terminated, the limitation to non-contact visits would meet any concern about the safety and security of the children. There was no evidence presented to suggest that volume is an issue supporting these regulations. And with respect to Defendants' objective of eliminating administrative burden, the process of screening for the 10-visitor list already addresses this. Any adult bringing a minor child would have to go through the screening process of the visitor list approval; each prisoner is entitled to have ten visitors on their list, so the screening of an adult authorized to accompany a minor child would create no greater burden than that already imposed by the regulations. Finally, although Defendants claim that there could be a problem with forgery or authorizing documents such as power of attorney, no evidence supports that claim.

With respect to the remaining *Turner* factors, Plaintiffs also prevail. Uncontroverted evidence establishes that letters and telephone calls are not adequate alternate means of staying in contact with minor children. The use of non-contact visits for these now excluded visitors would have no impact on guards or other inmates, and a minimal impact on the allocation of prison resources. And the existence of the obvious alternative of non-contact visitation is in itself evidence that the regulation is not reasonable.

Therefore, the Court finds that Plaintiffs have prevailed in establishing the unconstitutionality of the MDOC regulations excluding minor siblings, nieces and nephews, excluding former prisoners, requiring that minor children be brought by an immediate family member or guardian, and excluding children whose prisoner parents have had their parental rights terminated. The restrictions are not reasonably related to legitimate penological interests when considered in the context of non-contact visitation.

II. Permanent Ban on Visits Based on Two Substantive Abuse Misconducts

A. Eighth Amendment

The Eighth Amendment, which applies to the States through the Due Process Clause of the Fourteenth Amendment, prohibits "cruel and unusual punishment" to those convicted of crimes. U.S. CONST. amend. VIII. The Supreme Court has interpreted the Amendment "in a flexible and dynamic manner." *Gregg v. Georgia,* 428 U.S. 153, 171, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976). In the earlier cases, the Supreme Court applied the Eighth Amendment to barbarous physical punishments. *See In re Kemmler,* 136 U.S. 436, 34 L. Ed. 519, 10 S. Ct. 930 (1890); *Wilkerson v. Utah,* 99 U.S. 130, 25 L. Ed. 345 (1879). However, more recently, the Supreme Court has extended the Eighth Amendment to cover punishments which "'involve the unnecessary and wanton infliction of pain,'" "are grossly disproportionate to the severity of the crime," or "are 'totally without penological justification.'" *Rhodes v. Chapman,* 452 U.S. 337, 345, 69 L. Ed. 2d 59, 101 S. Ct. 2392 (1981) (quoting *Gregg,* 428 U.S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909; *Coker v. Georgia,* 433 U.S. 584, 592, 53 L. Ed. 2d 982, 97 S. Ct. 2861 (1977) (plurality opinion); *Weems v. United States,* 217 U.S. 349, 54 L. Ed. 793, 30 S. Ct. 544 (1910)).

The Eighth Amendment "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency' . . . against which [courts] must evaluate penal measures." *Estelle v. Gamble,* 429 U.S. 97, 102, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976) (quoting *Jackson v. Bishop,* 404 F.2d 571, 579 (8th Cir. 1968)). Accordingly, the Amendment "'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" *Id.* (quoting *Trop v. Dulles,* 356 U.S. 86, 101, 2 L. Ed. 2d 630, 78 S. Ct. 590 (1958) (plurality opinion)).

The present case involves a condition of confinement. Specifically, it involves a permanent ban on visitation when an inmate has two substance abuse violations. "It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." *Helling v. McKinney,* 509 U.S. 25, 31, 125 L. Ed. 2d 22, 113 S. Ct. 2475 (1993). The Supreme Court stated:

> When the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being. . . . The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs-- *e.g.*, food clothing, shelter, medical care, and reasonable safety-- it transgresses the substantive limits on state action set by the Eighth Amendment. . . .

DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189, 199-200, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989).

In order to hold that a condition of confinement violates the Eighth Amendment, two requirements must be met. The first requirement is that the deprivation must be "sufficiently serious." *Farmer v. Brennan,* 511 U.S. 825, 834, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (quoting *Wilson v. Seiter,* 501 U.S. 294, 298, 115 L. Ed. 2d 271, 111 S. Ct. 2321 (1991)); *Rhodes,* 452 U.S. at 347. In *Rhodes v. Chapman,* 452 U.S. 337, 69 L. Ed. 2d 59, 101 S. Ct. 2392 (1981), the Court held that lodging two inmates in a single cell was not "sufficiently serious," and, therefore, did not constitute cruel and unusual punishment under the Eighth Amendment. The Court stated that the Constitution "does not mandate comfortable prisons," but prohibits only those deprivations which deny "the minimal civilized measure of life's necessities." *Id.* at 347.

The second requirement is that a prison official must have a "sufficiently culpable state of mind." *Farmer,* 511 U.S. at 834 (quoting *Wilson,* 501 U.S. at 297). "In prison conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety." *Id.* (citing *Wilson,* 501 U.S. at 302-03). That is, "[a] prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment." 511 U.S. at 828 (citing *Helling,* 509 U.S. at 25; *Wilson,* 501 U.S. at 294; *Estelle,* 429 U.S. at 97). The Court defined deliberate indifference as "knowing that inmates face substantial risk of serious harm and disregarding that risk by failing to take reasonable measures to abate it." *Farmer,* 511 U.S. at 847. "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence. . . . And a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer,* 511 U.S. at 842.

This Court holds that the permanent ban on visitation for two substance abuse misconducts violates the Eight

Amendment's prohibition against cruel and unusual punishment. *See Laaman v. Helgemoe,* 437 F. Supp. 269, 322 (D. N.H. 1977) (stating that "unreasonable restrictions on visitation . . . involves the Eighth Amendment where the failure to allow inmates to keep their community ties and family bonds promotes degeneration and decreases their chances of successful reintegration into society").

The unrefuted evidence establishes that visitation with family and friends is the single most important factor in stabilizing a prisoner's mental health, encouraging a positive adjustment to the prisoner's term of incarceration, and supporting a prisoner's successful return to society. *See* Kupers, Tr. 6, pp. 130-35. Dr. Kupers testified about the profile of the Michigan's prison population as follows:

> Generally, prisoners in Michigan and nationwide, and not really much variance in the two, are very poor, they're from low income backgrounds, they have very little education. 40 some percent are functionally illiterate. They tend to be disproportionately African American and Hispanic; close to 50 percent African American, and another 15 to 20 percent Hispanic and other minorities.
>
> They tend to have experienced repeated and severe traumas throughout their life, including physical and sexual abuse. The sexual abuse is more prevalent in women prisoners than in men. There's a very high incidence of certain diseases; for instance, HIV and AIDS and hepatitis C, approximately six to ten times the rest of the population.
>
> Mental illness is very prevalent. There's between 16 and 25 percent of prisoners suffer from a significant mental illness warranting treatment. The DOJ released

> a report approximately a year ago that 283,000 prisoners in the nation suffer from serious mental illness.
>
> And in terms of substance abuse, various estimates are between 60 and 80 percent of prisoners suffer from significant substance abuse.

Kupers, Tr. 6, pp. 129-30.

With respect to the overall importance of visitation, Kupers went on to say:

> Prisoners with any length of sentence who had three people who they had quality and continuous contact with during their entire term of incarceration were 1/6 as likely to be back in prison after, a year after their release, than those who didn't have that much contact. Those people were six times more likely to return to prison after a year.
>
> There have been a lot of studies that come up with essentially the same finding, and that's why I say that it's the factor that correlates most strongly with success after release.

Kupers, Tr. 6, pp. 131-32.

Concerning the importance of visitation to prisoners with mental illness and those with parental responsibilities, Kupers stated:

> A. . . . people with mental illness probably need more visitation. They probably need their family support more than average, normal people, and of course whenever I make a generalization like that, there are exceptions in every direction, but there are quite a few studies that show whether someone with a

mental illness is in a hospital or a correctional facility that they're attaining stability mentally, and their eventual success after they're discharged or released is greatly increased by having meaningful family contact and social support during the time that they're in the hospital or in prison.

Q. Is there a different import of visits that are recognized between prisoners who are parents and the visits with their children, as opposed to other prisoners?

A. Absolutely, and there are differences between men and women. Parents have a very close bond with their children. They feel a great responsibility for raising their children. Women prisoners tend, 80 percent of them have children, 80 percent of those are single mothers, and there is a very, very high incidence of depression in women's prisons, and in most of the literature in correctional psychiatry and in general psychiatry, that is attributed to the separation from their children and loved ones.

Men also, to a lesser extent, slightly, and they're less able to verbalize it, and they're more likely to act out, but men who are fathers also have real difficulties because of the fact that they're separated from their children.

Kupers, Tr. 6, p. 132-33.

Defendants do not challenge Dr. Kupers' testimony about the importance of visitation; indeed, many Department of Corrections witnesses testified that visitation was chosen as the vehicle of punishment precisely because it is important to

prisoners, and therefore perceived as a "powerful tool" for prison management.

While emphasizing the positive effect of visitation on a prisoner's mental health, general adjustment, and successful re-entry to society, Dr. Kupers also testified to the devastating impact on the prisoner when visits are eliminated. With respect to the impact to the spousal relationship, Dr. Kupers stated:

Q. Do you have an opinion about what a permanent ban would do on a marital relationship between a prisoner and an outside spouse?

A. Yes, I do. When I described the sibling bond, I said that one thing you know about your sibling, whether you're close or distant, is that you will be together to bury your parents. That's not true of marital bonds or primary relationships, so there is a high rate of separation of prisoners and their spouses during the term of incarceration. There was a study done of this in the '70s, and the author said that, actually, a quarter of prisoners' primary relationship breaks up in the first year or two of incarceration. Now, what's significant about that is how impressive it is that three quarters don't break up and the spouse continues to visit.

Well, if you put a two-year hiatus or longer in the ability of the spouse to visit, it will have a very detrimental effect on the continuity of those relationships, and probably the rate of separation and divorce will go higher, and that will have ripple effect, negative effects on the children, et cetera.

Q. And what is, if you know, based upon your practice and your review of the literature, the impact

on prisoners for the breakup of their marriage during their incarceration?

A. Besides losing contact with their children, that's probably the most destructive relational separation that occurs for a prisoner. There are studies that show that if a prisoner is released and goes to live with a partner, their recidivism rate, on average, goes way down, almost down to 15, 20 percent, as compared to 63 percent which is the standard recidivism rate.

And the conclusion of that study was that a prisoner living alone is going to get into trouble, particularly in that very difficult period right after being released, whereas a prisoner who returns to their family or partner, they are going to do an awful lot better.

Well, that's just one little glimpse of the harm done to the prisoner when a primary relationship breaks up. The prisoner begins to despair, there are all kinds of implications in terms of developing mental illness of various kinds. There is the possibility of not caring and getting into disciplinary trouble. There is the possibility of substance use, et cetera.

Kupers, Tr. 6, 159-61.

Dr. Kupers also emphasized the overwhelming impact of the permanent visitation restriction on prisoners suffering from or prone to mental illness:

> Q. Dr. Kupers, could you tell us if there's any different or unique impact of this permanent restriction on those prisoners who are suffering from some form of mental illness?

A. Yes. What I have found in general, and I think the literature supports me on this, is that people enter prison prone to one or another kind of mental illness. For instance, some people are prone to depression, some people are prone to paranoia, some people are prone to disorganization and schizophrenic breakdown.

Now, if those people with that propensity are housed in a secure place, feel safe and able to establish some kind of productive work and close relationships with people, they might not have a mental breakdown. But if they're stressed, severely stressed or traumatized, they're more likely to have a mental breakdown.

So what happens to someone who goes into prison with a propensity to mental break down, and if they went in at a young age, they may not have had a mental breakdown yet, or they may have had a long history [of] mental illness and treatment. If they go in, each stressful condition and each successive trauma makes it more likely that they'll have the kind of breakdown that their psychological makeup makes them prone to.

So in terms of someone with mental illness, it's extremely important for them to be in contact with their loved ones and support system, and when they're not, they're more likely than anyone else to have a mental breakdown of the kind they have a propensity for.

Kupers, Tr. 6, pp. 165-66.

Further, Dr. Kupers testified that a permanent visitor restriction would be counterproductive to substance abuse

treatment and would actually tend to increase a prisoner's tendency to resort to drug abuse:

> Q. In the consensus of how to treat substance abuse problems, is there any consensus as to whether or not separating substance abuse users from their close family contacts is a positive or a negative thing for the treatment?
>
> A. Yes. In all of the different approaches within that framework I just gave, developing the support network is considered a crucial part of the work, so actually the opposite would occur. Instead of enforcing or even permitting separation, what the drug counselor would tend to do is bring the individual closer to the family.

Kupers, Tr. 6, p. 170.

> Q. Do you have an opinion with regard to the use of a permanent ban on all visitation for people who have substance abuse problems, as to how that will affect people who have those problems?
>
> A. Yes, I do.
>
> Q. Could you tell me?
>
> A. It will be counter therapeutic, to the extreme, and that is that the lack of contact with family, particularly if there's a sense that it's unfair, that there's no hope of reversing it, and that there's nothing the individual can do about it, as I said in the previous part of the discussion, will tend to make the person resentful, that will tend to make them act out and not take part in a

> program, and certainly it will have some ramifications in terms of them resorting to substances.
>
> By the way, they may not resort to substances inside the prison. There's a large percentage of prisoners who have substance problems, as I said, 60 to 80 percent, and there's very few percent, I'd say a couple of percent, of prisoners who use substances inside. Most prisoners with a drug or alcohol problem do not use inside of prison. The problem we're worried about is what happens when they get out. And in the way I just described, the lack of contact with loved ones makes them much more prone to abuse again once they're discharged.

Kupers, Tr. 6, pp. 171-72.

Defendants offered no evidence to contradict Dr. Kupers, and anecdotal support for his opinions was offered by a number of Plaintiffs' witnesses and exhibits, as more fully set forth in the Court's Findings of Fact. Based on the evidence of record, the Court concludes that the permanent restriction on visitation meets the "sufficiently serious" test set forth in *Farmer supra.* n54 This finding applies to the ban whether it is in fact "permanent" or rather reviewable in two years, as sometimes applied. As Dr. Kupers and other witnesses indicated, the uncertainly and inconsistency of application creates additional problems, also sufficiently serious to meet the *Farmer* test. But the problems with this restriction would not be cured even if there were some way to assume prompt and certain implementation and consistent time limits. A two-year restriction on all visits is sufficiently serious to meet the *Farmer* test. A long-term restriction on all visitation goes to the essence of what it means to be human; it destroys the social, emotional, and physical bonds of parent and child, husband and wife, body and soul. Nothing could be more fundamental.

n54 Dr. Kupers also testified that the permanent ban is "cruel" in his professional opinion, because 1) it denies or damages [the prisoner] in terms of a basic human need; 2) the measure taken is excessive for the situation; 3) an average, ordinary person would find it abhorrent or appalling; and 4) the person perpetrating the policy intends to do harm. *See* Tr. 7, pp. 23-24, 30-31.

Furthermore, this restriction has been imposed with a callousness that could serve as the definition of deliberate indifference. Permanent restrictions have been imposed where the extenuating circumstances underlying the substance abuse misconduct include the death of a parent, recovery from cancer surgery, allergic reaction to the drug patch, medical conditions making it difficult to provide urine for a drug test, and serious mental illness. n55 The restriction is often not imposed for months or even years after the second qualifying misconduct. Prisoners are often not told how long the restriction will last, and statements that the restriction will be reviewed within a certain time frame are not followed. Prisoners are not told what they must do to get the restriction lifted, nor why their request for reinstatement has been denied. And although Plaintiffs presented some of the more dramatic and idiosyncratic stories of prisoners affected by the permanent ban, it is the pain and confusion evident in the more ordinary cases that is most compelling: Brenda Clark, who cannot see her six and fifteen year old children because of a misconduct based on her inability to urinate for a drug test (notwithstanding being on medication for Chron's Disease, a side-effect of which is difficulty in urinating); Kim Staton, who could not see her young son for over two years, despite a state court order requiring her sister to bring him to the prison (warden said sister had to bring him but prison did not have to let him visit); Merion Johnson, who has had no visits since April, 1997; Harrison Bowyer who has not had visitors since 1999 and is

unable to prepare for his parole hearing; David Brewer, who had no visitors for over a year before his release from prison and has had an extremely difficult time becoming reacquainted with his two young children. Witness after witness, exhibit after exhibit, all testify to the emotional and psychological devastation wrought by Defendants' policy, and the deliberate indifference with which it is enforced.

n55 Plaintiffs' Exhibit 40 includes a selection of files from the random 20% sample of the prisoners placed on permanent restriction since 1995. Presumably the remaining files would provide additional examples.

The Sixth Circuit has addressed the issue of visitation and held that "prison inmates have no absolute constitutional right to visitation." *Bellamy v. Bradley*, 729 F.2d 416, 420 (6th Cir. 1984) (citations omitted). "Limitations upon visitation may be imposed if they are necessary to meet penologicial objectives such as the rehabilitation and the maintenance of security and order." *Id.* (citations omitted). This Court concludes that, in the instant matter, the permanent ban is not necessary to meet a penological objective. As stated previously, no evidence was presented to substantiate that the permanent ban has reduced substance abuse or instances of violence within the Department, and substantial evidence was presented to establish that the permanent ban is counterproductive to the prisoners' mental health, stability, potential for future substance abuse, and rehabilitation.

This Court acknowledges that conditions which are harsh and even restrictive are "part of the penalty that criminal offenders pay for their offenses against society." *Rhodes*, 452 U.S. at 347. Under contemporary standards of decency, however, a permanent ban on visitation presents more than just a harsh and restrictive condition. When conditions of confinement amount to cruel and unusual punishment, 'federal

courts will discharge their duty to protect [inmates] constitutional rights.'" *Rhodes,* 452 U.S. at 351 (citations omitted). Such a case is presented here.

B. First Amendment

As discussed above, the First Amendment, applied to the States through the Fourteenth Amendment, protects prisoners' rights of association in the context of visitation. When the State restricts those rights, the Court must apply the *Turner* balancing test to determine the legitimacy of the restriction.

With respect to the permanent ban on visitation imposed after two substance abuse misconducts, it is questionable whether there is a valid rational connection between the permanent ban and the stated penological interest of reducing substance abuse in prisons. Several defense witnesses testified that it was their impression that substance abuse within the system had decreased since 1995, but no statistical evidence was introduced to support this. In addition, Plaintiffs' expert Dr. Kupers testified that the imposition of the permanent ban would be counterproductive to the goal of reducing substance abuse, since it would lead to increased depression, contribute to psychological and emotional instability, and ultimately promote increased dependence on illegal substances. *See* Kupers, Tr. 7, pp. 15-19, 38-39. Dr. Mintzes offered similar expert testimony. *See* Tr. 6, pp. 26-27. Moreover, there was no evidence to suggest that prisoners refrained from substance abuse after the restriction was imposed, and in fact many prisoners were denied reinstatement of visiting privileges because of continued substance abuse misconducts. *See* Pls.' Ex. 40. Thus, there is scant evidence, if any, that the permanent ban is rationally and validly connected to the penological objective of reducing substance abuse; the weight of the evidence establishes that this restriction is counterproductive to its goal.

The second *Turner* factor is whether there are alternative means for the prisoner to exercise the implicated constitutional rights. The restriction at issue is a permanent ban on all visits (other than with an attorney or clergy). As discussed above, letters and telephone calls are not adequate substitutes for visits with family and friends. This factor clearly weighs in favor of Plaintiffs' claims.

The third *Turner* factor is what impact accommodation of the implicated constitutional right would have on the prison administration. Prior to 1995, this sanction did not exist. The overwhelming evidence is that administration of the permanent ban, riddled with uncertainty and inconsistency, has been a nightmare for the MDOC as well as for the prisoners. Revocation of this restriction would have a positive impact on prison administration. To the extent that the Defendants believe they would be losing a "powerful management tool," as testified to by Warden Caruso, there are other sanctions already in place and utilized to punish substance abuse misconducts, including loss of good time and change in security level.

Finally, with respect to the fourth *Turner* factor, the evidence establishes that the permanent ban on visits is an exaggerated response to prison concerns. As set forth above, drug abuse in Michigan prisons had actually decreased since mandatory drug testing began in the 1980s. *See* VanOchten, Tr. 1, pp. 88-89. Statistical evidence compiled by Plainitffs showed that drug use by prisoners is not a pervasive problem within the MDOC. *See* Kupers, Tr. 7, pp. 38-39. Former Director McGinnis acknowledged his 1994 testimony (prior to the permanent ban) "that Michigan prisons were well managed, well controlled and had an absence of violence." McGinnis, Tr. 8, p. 52. Further, Defendants' acknowledgment that they do not have enough treatment programs available to handle the prisoners battling substance abuse problems, and the inability

of the Department to provide appropriate substance abuse treatment in many instances, shows that the MDOC is using this draconian restriction as a substitute for meaningful treatment which might actually accomplish the long-term goal of reducing drug dependency and recidivism. *See* VanOchten, Tr. 1, pp. 96-97. Thus, all four of the *Turner* factors weigh in favor of Plaintiffs' position that the permanent ban unreasonably burdens their constitutional rights under the First Amendment.

C. Fourteenth Amendment

The Fourteenth Amendment provides that a State shall not "deprive any person of life, liberty or property, without due process of law." U.S. CONST. amend. XIV, § 1. It protects "the individual against arbitrary action of government. " *Wolff v. McDonnell,* 418 U.S. 539, 558, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974). A due process claim is examined in two steps. First, the Court must first ask whether the individual possesses a liberty or property interest which has been interfered with by the State. *See Kentucky Dep't. of Corr. v. Thompson,* 490 U.S. 454, 460, 104 L. Ed. 2d 506, 109 S. Ct. 1904 (1989) (citing *Bd. of Regents of State Colls. v. Roth,* 408 U.S. 564, 571, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972)). Second, the Court must ask "whether the procedures attendant upon that deprivation were constitutionally sufficient." *Id.* (citing *Hewitt v. Helms,* 459 U.S. 460, 472, 74 L. Ed. 2d 675, 103 S. Ct. 864 (1983)).

Protected liberty interests may arise from two sources -- the Due Process Clause itself or the laws of the States. *Thompson,* 490 U.S. at 460 (citing *Hewitt,* 459 U.S. at 466). In *Sandin v. Conner,* 515 U.S. 472, 132 L. Ed. 2d 418, 115 S. Ct. 2293 (1995), the Supreme Court constructed a new approach for determining whether a prisoner derives a liberty interest from state law. As the Court stated, these interests "will be generally limited to freedom from restraint which, while not exceeding

the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes *atypical and significant hardship* on the inmate in relation to the ordinary incidents of prison life." *Sandin,* 515 U.S. at 484 (emphasis added) (citations omitted). To determine what constitutes an "atypical and significant hardship" courts consider 1) the effect of the restraint on the length of prison confinement; 2) the extent to which the prisoner's confinement is altered from routine prison conditions; and, 3) the duration of the restraint. *See Jones v. Baker,* 155 F.3d 810, 814 (6th Cir. 1998) (Gilman, J., concurring) (citing *Wright v. Coughlin,* 132 F.3d 133, 136 (2d Cir. 1998)). n56

n56 Prior to its decision in *Sandin*, the Supreme Court held that inmates do not have a due process right to unfettered visitation. *See Thompson,* 490 U.S. at 460. In *Thompson*, inmates challenged Kentucky prison regulations that allowed for the suspension of inmates' visitation with certain types of visitors. *See id.* The *Thompson* Court found no interest in unfettered visitation which derives directly from the Due Process Clause and, applying the methodology it set out in *Hewitt v. Helms,* 459 U.S. 460, 74 L. Ed. 2d 675, 103 S. Ct. 864 (1983), held that the State regulations had not otherwise created such an interest. *See id.* Neither *Thompson* nor the cases which followed it, however, addressed a ban on visitation similar to Michigan's permanent ban imposed on prisoners who have been found guilty of two substance abuse misconducts. And in his concurring opinion in *Thompson*, Justice Kennedy specifically noted that the Court's opinion did not foreclose a Due Process challenge to a prison regulation permanently forbidding all visits to some or all prisoners. *See Thompson,* 490 U.S. at 465 (Kennedy, J., concurring); *see also Loomis v. Rentie,* 62 F.3d 1424, 1995 WL 453140, at *1 (9th Cir. July 31, 1995) (reversing grant

of summary judgment against prisoner where record insufficient to determine if denial of all visitation for an extended period deprived prisoner of liberty interest under the Due Process Clause).

With respect to the permanent ban on visitation imposed when a prisoner is found guilty of two substance abuse misconducts, the Court concludes that such a restriction constitutes an atypical and significant hardship on Plaintiffs and thereby deprives them of an interest protected by the Fourteenth Amendment. The first *Sandin* factor is "the effect of disciplinary action on the length of prison confinement." Although there was testimony that the permanent visitation restriction makes it more difficult for prisoners to prepare for parole hearings, thereby potentially lengthening a prisoner's sentence, the length of confinement is not significantly affected by the permanent ban on visitation.

The second factor is "the extent to which the conditions of the restriction differ from other routine prison conditions." As more fully set forth above, the permanent ban on visitation is unique among state prison systems. It contradicts ACA standards; it differs sharply from past practice within the MDOC; and it creates an unusually harsh and punitive environment for the prisoners restricted.

The third factor is "the duration of the restriction imposed compared to discretionary confinement." The restriction at issue is permanent. Although the regulations provide for the possibility of review after two years, there are many instances where no such review occurs, or where reinstatement of privileges after two years is denied. As of the date of trial, over half of the restricted prisoners had been on the permanent ban for more than twenty-seven months; a significant number had been restricted for over three and a half years. The extent to which the permanent restriction differs from other routine

prison conditions, and the duration of the restriction at issue here, weigh heavily in favor of Plaintiffs' claim that Defendants' policy violates the Fourteenth Amendment. The inconsistency and uncertainty of enforcement, the absence of any criteria for reinstatement, and the failure to provide any opportunity to be heard are all procedural deprivations of constitutional dimension. The permanent ban on visitation is indeed an "atypical and significant hardship," apparently imposed for that very reason. In imposing this restriction, Defendants have violated Plaintiffs' rights under the Fourteenth Amendment.

CONCLUSION

The evidence presented in this case provides an intimate look at the psychological, emotional, and physical constraints of incarceration. Visits from family and friends are one of the slender reeds sustaining prisoners during their confinement; prisoners and prison administrators rely upon the stabilizing and rehabilitative effects promoted by supportive visits.

For all the reasons stated above, the visitation restrictions challenged by Plaintiffs violate the constitutional rights of Michigan's prisoners. Even under the most deferential review, these restrictions are not reasonably related to legitimate penological interests. The Court finds in favor of Plaintiffs on all claims.

/s/
Nancy G. Edmunds
U.S. District Court Judge

Dated: April 19, 2001

[133 F.3d 382]

MICHELLE BAZZETTA; STACY BARKER; TONI BUNTON; DEBRA KING; SHANTE ALLEN; ADRIENNE BRONAUGH; ALESIA BUTLER; TAMARA PRUDE; SUSAN FAIR; VALERIE BUNTON; ARTURO ZAVALA, through his next friend VALERIE BUNTON, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

KENNETH MCGINNIS, Director of Michigan Department Of Corrections; MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendants-Appellees.

Nos. 95-2181; 96-1559

UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT

February 4, 1997, Argued

January 5, 1998, Decided

January 5, 1998, Filed

SUBSEQUENT HISTORY:
Rehearing Denied (95-2181) February 2, 1998, Reported at: *1998 U.S. App. LEXIS 1870.*

Certiorari Denied June 26, 1998, Reported at: *1998 U.S. LEXIS 4310.*

PRIOR HISTORY:
Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 95-73540. Nancy G. Edmunds, District Judge.

Original Opinion of September 4, 1997, Reported at: *1997 U.S. App. LEXIS 23067.*

COUNSEL:
ARGUED: Deborah A. LaBelle, LAW OFFICES OF DEBORAH LABELLE, Ann Arbor, Michigan, for Appellant.

ARGUED: Kevin M. Thom, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS DIVISION, Lansing, Michigan, for Appellee.

ON BRIEF: Deborah A. LaBelle, LAW OFFICES OF DEBORAH LABELLE, Ann Arbor, Michigan, Michael Barnhart, Detroit, Michigan, for Appellant.

ON BRIEF: Lisa C. Ward, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS DIVISION, Lansing, Michigan, for Appellee.

JUDGES:
Before: SILER, COLE, and VAN GRAAFEILAND *, Circuit Judges.

* The Honorable Ellsworth A. Van Graafeiland, Circuit Judge of the United States Court of Appeals for the Second Circuit, sitting by designation.

OPINION BY:
VAN GRAAFEILAND

OPINION:

SUPPLEMENTARY OPINION

VAN GRAAFEILAND, Circuit Judge.

On September 4, 1997, this Court affirmed certain limitations on prisoner visitation imposed by the district court. See 124 F.3d 774. Because the Michigan Department of Corrections construes our opinion in a manner that was not intended, this Supplementary Opinion is written solely for the purpose of clarification.

The Department's brief on appeal contains the following clearly expressed and significantly emphasized statement:

> It is important to note that the visitation restrictions at issue involve limitations on *contact visitation* between members of the public, including minor children, and convicted felons.

There was nothing new or novel in this definition of the issue. The Department took the same position in the district court. In its response to the plaintiffs' motion for a preliminary injunction, it said:

> It is important to emphasize that the challenged visitation policies at issue in this case concern limitations on contact visitation. Since contact

> visitation involves personal, face-to-face contact by convicted/incarcerated felons with members of the public, the sheer volume of visitations alone (2300 contact visits each day, averaging 69,000 visits each month, for about 820,000 visits annually) must be restricted for reasons of security and administrative concerns related to maintaining internal order and discipline throughout all MDOC prison facilities. There can be no dispute that 820,000 visits annually presents a very difficult penological problem for MDOC with regard to the scheduling, screening, supervision and monitoring of contact visitation.

The Department continued:

> Although MDOC is mindful of the close familial relationships that exist between a father and/or mother with their children, significant security and related administrative concerns caused by the high volume of contact visitation mandate a more narrow definition of the minor children (children, stepchildren and grandchildren) that are allowed contact visitation at MDOC facilities. Given MDOC's legitimate penological interest in maintaining order and security at its prison facilities and the real dangers involved whenever children participate in contact visits, these visitor restrictions are a reasonable response to important competing interests.

The evidence submitted by the Department was addressed to the issue of contact visitation, and this too was referred to in the above-mentioned response:

> As the attached affidavits of Deputy Director Bolden, Warden Burke and Warden Langley reveal, contact visitation between minor children and incarcerated

> felons presents a continuing problem for MDOC with regard to the security of its prison facilities and the safety of the minor children at these facilities.

The Department's motion for summary judgment also addressed the issue as that of contact visitation:

> Limiting the number of minor children who are involved in contact visitation with incarcerated felons will enable MDOC to more closely monitor these visits to insure that no abuse or smuggling occurs as a result of contact visitation.
>
> . . . .
>
> . . . Plaintiffs also argue that the visitor restrictions are unconstitutional because the restrictions limit the right of members of the public to visit incarcerated felons. However, because members of the public have alternate methods to communicate with incarcerated felons, restrictions on contact visits between members of the public and inmates are not unconstitutional.

When the litigation moved to this Court, contact visitation was the obvious concern expounded in the Department's brief. At page 9 of its brief, the Department said "contact visits invite a host of security problems," and then proceeded to describe them. At page 13, the Department said that "because members of the public have alternate methods to communicate with incarcerated felons, restrictions on contact visits between members of the public and inmates are not unconstitutional." On page 14, it said that "limiting the number of minor children who are involved in contact visitation with incarcerated felons will enable MDOC to more closely monitor these visits to insure that no abuse or smuggling occurs as a result of contact visitation."

It is not surprising, therefore, that we held that "the visits at issue are 'contact visits,' i.e., visits that customarily take place in a 'visitation room' or other area set aside for this purpose and permit innocent-only physical contact between prisoner and visitor." 124 F.3d at 775. However, counsel for the Department now inform the Court that the Court erred in accepting counsel's definition of the issue and "apologize for any misstatement in earlier briefs that may have led the Court to believe the rule changes apply only to contact visits."

Overlooking the fact that Rule 791.6614 bears the caption "Noncontact visitation," Department counsel contend that Rules 791.6607 to 791.6614 apply to both contact and non-contact visits, and they assert that "this Court's September 4, 1997 Opinion can easily be extended to both." The Department did not make this argument in either the district court or this Court. It cannot be made here and now. This opinion is intended simply to make that point clear.

[124 F.3d 774]

MICHELLE BAZZETTA; STACY BARKER; TONI BUNTON; DEBRA KING; SHANTE ALLEN; ADRIENNE BRONAUGH; ALESIA BUTLER; TAMARA PRUDE; SUSAN FAIR; VALERIE BUNTON; ARTURO ZAVALA, through his next friend VALERIE BUNTON, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

KENNETH MCGINNIS, Director of Michigan Department Of Corrections; MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendants-Appellees.

Nos. 95-2181, 96-1559

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

February 4, 1997, Argued

September 4, 1997, Decided

September 4, 1997, Filed

SUBSEQUENT HISTORY:
Supplementary Opinion of January 5, 1998, Reported at: *1998 U.S. App. LEXIS 9.*

Certiorari Denied June 26, 1998, Reported at: *1998 U.S. LEXIS 4310.*

PRIOR HISTORY:
Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 95-73540. Nancy G. Edmunds, District Judge.

DISPOSITION:
Affirmed.

COUNSEL:
ARGUED: Deborah A. LaBelle, LAW OFFICES OF DEBORAH LABELLE, Ann Arbor, Michigan, for Appellant.

Kevin M. Thom, OFFICE OF THE ATTORNEY GENERAL CORRECTIONS DIVISION, Lansing, Michigan, for Appellee.

ON BRIEF: Deborah A. LaBelle, LAW OFFICES OF DEBORAH LABELLE, Ann Arbor, Michigan, Michael Barnhart, Detroit, Michigan, for Appellant.

Lisa C. Ward, OFFICE OF THE ATTORNEY GENERAL CORRECTIONS DIVISION, Lansing, Michigan, for Appellee.

JUDGES:
Before: SILER, COLE, and VAN GRAAFEILAND n1, Circuit Judges.

n1 The Honorable Ellsworth A. Van Graafeiland, Circuit Judge of the United States Court of Appeals for the Second Circuit, sitting by designation.

OPINION BY:
ELLSWORTH A. VAN GRAAFEILAND

OPINION:

VAN GRAAFEILAND, Circuit Judge.

Plaintiffs, certified classes of Michigan prison inmates and prospective prison visitors, appeal the denial of their motion for a preliminary injunction and the dismissal of their 42 U.S.C. § 1983 challenge to State regulations restricting prison visitation rights. The visits at issue are "contact visits," i.e., visits that customarily take place in a "visitation room" or other area set aside for this purpose and permit innocent-only physical contact between prisoner and visitor. Non-contact visits, on the other hand, take place in small booths or cubicles, and no contact of any sort is permitted.

Michigan grades its prisoners on the basis of their dangerous propensities. The grades are numbered I through VI, and the most dangerous inmates are placed in either grade V or grade VI. With rare exceptions, contact visits are not permitted in either of these two grades, and this restriction is not at issue herein. The Supreme Court has said: "that there is a valid, rational connection between a ban on contact visits and internal security of a detention facility is too obvious to warrant extended discussion." *Block v. Rutherford,* 468 U.S. 576, 586, 82 L. Ed. 2d 438, 104 S. Ct. 3227 (1984).

In recent years, Michigan prison officials have attempted to accommodate to some extent the visitation desires of the more tractable prisoners in the lower grades and here they have run

into problems. The *Block* Court's summary description of such problems is apt:

> Contact visits invite a host of security problems. They open the institution to the introduction of drugs, weapons, and other contraband. Visitors can easily conceal guns, knives, drugs, or other contraband in countless ways and pass them to an inmate unnoticed by even the most vigilant observers. And these items can readily be slipped from the clothing of an innocent child, or transferred by other visitors permitted close contact with inmates.

Id.

The Court also recognized the additional expense involved in the allowance of contact visitation:

> The reasonableness of petitioners' blanket prohibition is underscored by the costs--financial and otherwise--of the alternative response ordered by the District Court. Jail personnel, whom the District Court recognized are now free from the "complicated, expensive, and time-consuming processes" of interviewing, searching, and processing visitors would have to be reassigned to perform these tasks, perhaps requiring the hiring of additional personnel. Intrusive strip searches after contact visits would be necessary. Finally, as the District Court noted, at the very least, "modest" improvements of existing facilities would be required to accommodate a contact visitation program if the county did not purchase or build a new facility elsewhere. These are substantial costs that a facility's administrators might reasonably attempt to avoid.

Id. at 588 n.9 (citation omitted).

The instant litigation is a challenge to certain amendments of the Michigan Administrative Code that were promulgated by the Michigan Department of Corrections in August 1995. Briefly summarized, they provide that a visitor under eighteen must be a prisoner's child, step-child or grandchild and must be accompanied by an immediate family member or legal guardian; that prisoners may not visit with their natural children if their parental rights have been terminated for any reason; that prisoners may have only ten non-family individuals on their approved visitors list; that general members of the public may be on only one prisoner's visitation list; that a former prisoner may visit a current prisoner only if the former prisoner is an immediate family member or a person with special qualifications such as a lawyer, clergyman or government representative.

The above amendments did not evolve out of thin air; they were the end result of careful and thorough consideration by prison officials. An understanding of the amendments the officials promulgated requires some knowledge of the problems they faced. An appropriate starting point is a description of what constitutes a contact visit. The reader who visualizes such a visit as a wholesome and exclusive family get-together without the usual travails of a penal institution must quickly disabuse himself of that notion.

The meetings are held in large rooms with numerous people in attendance. Luella Burke, the warden at Saginaw Correctional Facility, testified at the preliminary injunction hearing that the visitation area there could handle 133 visitors at one time. Sally Langley, the warden at Florence Crain women's facility in Coldwater, Michigan, testified that the visitation room there had a seating capacity of 45. Both wardens, and Daniel Bolden, Deputy Director for the Bureau of Correctional Facilities, the State's third witness, testified that

these rooms were not "nice places" for children. When asked to elaborate, he said:

> Conduct of other visitors is the primary concern in terms of sexual behavior. We've had actual fist fights in there, we've had people assault people, lot of groping and other inappropriate behaviors that go on that people were visiting, and those things were observed and viewed by these children.

Rules of conduct were imposed for visitation areas, including a prohibition against touching or exposing breasts, buttocks or the genital area, but there were numerous infractions of this rule. Bolden acknowledged that prison officials had had "literally hundreds of cases regarding sexual misconduct."

Warden Burke testified about a letter she had received from a visiting wife which "talked about seeing triple X stuff in the visiting room, and she was referring to the groping, genital groping, breast groping, things of that sort which, you know, does go on . . . ."

Visitors were assigned specific seats or tables and were expected to remain where assigned. However, these expectations often were not realized. This was particularly true with respect to child visitors, who often left their assigned positions and mingled with other children or even with other prisoners. It was during such a wandering period that a three-year-old child was sexually assaulted by an inmate, an incident that the district judge described as a "public relations disaster" and Bolden termed "a nightmare." Bolden stated this "incident exacerbated and accelerated some things that we were already working on, and they may have prompted us to go further than we probably intended on our very own, what we were first

looking at. But we were looking at some change on our visiting policies."

When the visiting rooms were fully occupied and visitors had to abide their turn in a waiting room in which there was no assigned seating, child management was even more of a problem. Warden Langley's description is informative:

> Well, first of all, the children have to wait, sometimes for an extended period of time in a very small waiting area outside the gate. They get antsy, they are -- it's hard for them to sit still and, consequently, my officers have to ask the people that are escorting these children to keep them under control.
>
> They run up and down the hallways, they try to climb up the front of the information desk, they bump into the front gate, which causes a problem because it's an electric gate, and that can be problematic. They stick their little hands in the key bumper areas and, you know, they're children and they have a hard time trying to deal with waiting for long periods of time.

The prison officials made it clear, however, that their concern over the children's presence was not directed solely to the welfare and safety of the children. As Warden Burke pointed out, when the guards "have to spend time following a child and retrieving the child and bringing the child back, then their eyes are not watching what I view they really need to be watching."

By this statement, Burke was not referring simply to the improper sexual conduct but also, and perhaps more importantly, to the introduction of contraband. Warden Langley testified that "visitation is the largest source of the introduction of contraband into the system." Warden Burke

testified that the visiting process is the most common method for the introduction of contraband into the system, "absolutely no doubt about it." Deputy Director Bolden agreed: "unquestionably." *See Inmates of Allegheny County Jail v. Pierce,* 612 F.2d 754, 759 (3d Cir. 1979). The Department's Administrative Standards provide:

> It is imperative that prisoners and visitors be closely monitored at all times to ensure that contraband is not passed and that inappropriate behavior does not occur.

Unfortunately the volume of people who enter the prisons as visitors makes close monitoring of all of them difficult, if not impossible.

Bolden testified that in 1995 well over 800,000 people visited Michigan prisons and that this created "monumental problems in terms of trying to manage resources, both space and staff resources." He continued:

> Our staff is extremely over taxed now, trying to manage -- I don't think anyone can visualize trying to process 800,000 visitors a year in terms of staff resources involved and trying to get people in, get people out, and maintain some degree of order, some degree of security in those visiting areas. That's just an overwhelming responsibility for those folks who are trying to do that.

Warden Burke testified that between May of 1994 and May of 1995, Saginaw, a 1,224 bed facility, averaged over 4,500 visitors per month, with May of 1995 seeing 6,200. She continued:

> Any time you allow anyone to traverse the secure perimeter of a facility, you take a risk. Our job is

protection of public, number one. The visiting program is something that the Department has supported, but when you have that number of folks coming into a prison, there is the opportunity for contraband of all nature to be entered. Contraband gets in a number of ways, but most contraband in a correctional facility get in via the visiting process.

When asked later whether 133 visitors at one time was a significant number of people to be inside the walls of prison during visiting hours, she responded:

I guess I come back to my initial statement. Any time anyone traverses the secure perimeter of the facility, that's a challenge for us and so, yes, at any one time having 133 people inside your facility is certainly something that we are aware of and need to monitor closely.

Q. And why is it that you need to monitor it?

A. Throughout, you know, our system, and I think probably nationwide, it is well recognized that the visiting process is the process by which most illegal contraband gets inside a correctional facility, and when you have illegal contraband, albeit drugs, weapons, a sharp-ended anything, you have a management issue.

Our job, again, is protection. It starts with running a safe, secure prison, and when drugs get inside a facility, that creates a whole culture, a whole issue where individuals can get hurt, staff or prisoners. People will go to no ends to manipulate that system. It just simply is a very serious security concern.

With respect to the amending regulations at issue herein, she said:

I'm hopeful, and we have some indications already looking at our numbers that we will have fewer visits. The sheer number of visits that we have at our facility is a major issue to manage within the confines of a correctional facility, and so any reduction in numbers will make our job easier.

Hopefully, we will not run our visiting room at capacity as often as we have had to do in the past. That would make our officers' job easier to supervise both the indoor and outdoor visiting room. It will make visiting a more positive experience for the individuals who are visiting. We have many family members who want to come and visit and have an honest visit with their incarcerated family member.

Warden Langley, after describing the unruly conduct of visiting children, testified that a reduction in their number would help "to give the officers within the visiting room and the other areas of the visiting room better opportunity to closely monitor these types of other activities that they're supposed to be monitoring."

Visitations in Michigan's penal institutions during the period preceding the amendments at issue herein averaged 2,300 a day. This required 2,300 searches by guards at the prison gates and at the entrances to the visitation areas. Departure and reentry searches of those who found it necessary to leave the visitation area temporarily also were required. Constant surveillance of the visitation area itself had to be conducted whenever it was occupied. Thorough post-visitation searches of the inmates also was required to uncover the

possible possession of contraband. These duties clearly fall within the ambit of "complicated, expensive, and time-consuming processes" referred to by the Supreme Court in *Block, supra,* 468 U.S. at 588 n.9. We now are asked to hold that these burdens, with all their unfortunate ramifications, can be imposed upon Michigan's penal institutions as a matter of constitutional right. We decline to do so.

In arriving at this decision, we apply the standard of review stated and reiterated by the Supreme Court; viz., that problems of prison administration are peculiarly for resolution by prison authorities and their resolution should be accorded deference by the courts. *See Washington v. Harper,* 494 U.S. 210, 224, 108 L. Ed. 2d 178, 110 S. Ct. 1028 (1990); *Turner v. Safley,* 482 U.S. 78, 84-96, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987); *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 349, 96 L. Ed. 2d 282, 107 S. Ct. 2400 (1987); *Bell v. Wolfish,* 441 U.S. 520, 547, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979). Moreover, where, as here, a state penal system is involved, federal courts have "additional reason to accord deference to the appropriate prison authorities." *Turner, supra,* 482 U.S. at 86 (citing *Procunier v. Martinez,* 416 U.S. 396, 405, 40 L. Ed. 2d 224, 94 S. Ct. 1800 (1974)). The important word, one that appears specifically or by implication in all the pertinent Supreme Court opinions, is "deference."

Appellants attempt to avoid the concept of deference by arguing that, because the district court proceeded by grant of summary judgment, it should have construed the evidence in the light most favorable to them. Indeed, because appellees moved for summary judgment before filing their answer, appellants contend that every allegation in their complaint should have been accepted as true. We are not persuaded. Utilization of these summary judgment concepts would not be an act of deference. It would, instead, be a usurpation of the

original decision-making process which the Supreme Court has placed in the hands of the prison officials.

The issue in the instant case was basically one of law, viz., were the amendments of the prison regulations reasonably related to and supportive of legitimate penological interests. If they were, the district court's inquiry could be terminated. *See Block, supra,* 468 U.S. at 589; *see also O'Bryan v. County of Saginaw,* 741 F.2d 283, 285 (6th Cir. 1984). We find no merit in appellant's belated claims that they should have had an opportunity for discovery as to the motive and intent of the prison officials. No request for such discovery was made in the district court; prison officials were examined at length in connection with appellants' preliminary injunction motion, and no motive or intent other than legitimate penological interests is even suggested. The prison officials' purpose in promulgating the regulations at issue was to protect both the penal institutions and their visitors. Comments by attorneys on both sides indicated that the officials were well along in the accomplishment of this purpose. The district court properly concluded that nothing in the Constitution precluded the officials from pursuing their salutary efforts.

Our decision to affirm is supported by the well-established principle that there is no inherent, absolute constitutional right to contact visits with prisoners. *See Bellamy v. Bradley,* 729 F.2d 416, 420 (6th Cir.) ("Prison inmates have no absolute constitutional right to visitation."), *cert. denied,* 469 U.S. 845, 83 L. Ed. 2d 93, 105 S. Ct. 156 (1984); *O'Bryan, supra,* 741 F.2d at 285; *Percy v. Jabe,* 823 F. Supp. 445, 448 (S.D. Mich. 1993). A properly imposed ban on contact visits will survive claims of Due Process violation. *Kentucky Dep't of Corrections v. Thompson,* 490 U.S. 454, 460-61, 104 L. Ed. 2d 506, 109 S. Ct. 1904 (1989); *see Hewitt v. Helms,* 459 U.S. 460, 468, 74 L. Ed. 2d 675, 103 S. Ct. 864 (1983). The same is true of the First Amendment right of association. *See Jones v.*

North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 129-30, 53 L. Ed. 2d 629, 97 S. Ct. 2532 (1977); *Southerland v. Thigpen*, 784 F.2d 713, 717 (5th Cir. 1986). Restrictions, in the nature and amount of those involved herein, cannot be said to constitute cruel and unusual punishment under the Eighth Amendment. Appellants err in their contention that the restrictions at issue apply to both contact and non-contact visits. A fair reading of the amendments makes it clear that they apply only to the former. Moreover, to the extent, if any, that they may be construed as "punishments," they are punishments that are imposed upon every prisoner at the time of sentencing. They are the "rules of the game" pursuant to which the Michigan penal system operates.

Depending upon how it is construed and applied, the rule, which denies a prisoner all visitation privileges upon his or her having been found guilty of violating two major regulations involving substance abuse, might be construed as a form of punishment that merits different treatment. However, the district court did not believe that this issue was ripe for resolution, and we cannot quarrel with this determination. In its present form, the rule requires the fleshing out that comes from attempted enforcement. *See, e.g., Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461, 89 L. Ed. 1725, 65 S. Ct. 1384 (1945).

Viewed from a constitutional standpoint, if, as we now hold, the prison officials properly limited the visitation rights of the prisoners because the limitations were reasonably related to legitimate penological interests, the effect of these regulations upon persons outside the prison was largely irrelevant. In *Thornburgh v. Abbott*, 490 U.S. 401, 410 n.9, 104 L. Ed. 2d 459, 109 S. Ct. 1874 (1989), the Court said:

> We do not think it sufficient to focus, as respondents urge, on the identity of the individuals

> whose rights allegedly have been infringed. Although the Court took special note in *Procunier v. Martinez*, 416 U.S. 396, 40 L. Ed. 2d 224, 94 S. Ct. 1800 (1974), of the fact that the rights of nonprisoners were at issue, and stated a rule in *Turner v. Safley*, 482 U.S. 78, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987), for circumstances in which "a prison regulation impinges on *inmates*' constitutional rights," *id.*, at 89 (emphasis added), any attempt to forge separate standards for cases implicating the rights of outsiders is out of step with the intervening decisions in *Pell v. Procunier*, 417 U.S. 817, 41 L. Ed. 2d 495, 94 S. Ct. 2800 (1974); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 53 L. Ed. 2d 629, 97 S. Ct. 2532 (1977); and *Bell v. Wolfish*, 441 U.S. 520, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979). These three cases, on which the Court expressly relied in *Turner* when it announced the reasonableness standard for "inmates' constitutional rights" cases, all involved regulations that affected rights of prisoners *and* outsiders.

In *Goodwin v. Turner*, 908 F.2d 1395, 1399 (8th Cir. 1990), the court enlarged upon this legal exposition:

> We cannot subject prison regulations to strict scrutiny every time a family member is affected by the prison regulation. Incarceration necessarily deprives an individual of the freedom "to be with family and friends and to form the other enduring attachments of normal life." *Morrissey v. Brewer*, 408 U.S. 471, 482, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484 (1972). By its very nature, incarceration necessarily affects the prisoner's family. *See Southerland v. Thigpen*, 784 F.2d 713, 717-18 (5th Cir. 1986). For example, a wife's constitutional right to freedom of association is directly impinged by prison regulations which limit

> her ability to visit with her husband while he is incarcerated. We would not, however, subject such a regulation to strict scrutiny merely because her associational rights were implicated. Such restrictions on the prisoner's liberty would be sustained if they were reasonably related to achieving a legitimate penological objective. To that extent, the wife's associational rights are not relevant.

In *Brewer v. Wilkinson*, 3 F.3d 816, 823 n.9 (5th Cir. 1993), *cert. denied*, 510 U.S. 1123, 127 L. Ed. 2d 397, 114 S. Ct. 1081 (1994), the court said:

> Thus, the *Thornburgh* Court stressed *Turner's* mandate that even though prison regulations or practices might burden the fundamental rights of "outsiders," the proper inquiry was whether the regulation or practice in question was reasonably related to legitimate penological objectives.

Similar reasoning has been applied in Federal Sentencing Guidelines cases in which prisoners seek special treatment because of family circumstances. Although "the imposition of prison sentences normally disrupts spousal and parental relationships," *United States v. Daly*, 883 F.2d 313, 319 (4th Cir. 1989), *cert. denied*, 496 U.S. 927, 110 L. Ed. 2d 643, 110 S. Ct. 2622 (1990), and "it is not uncommon for innocent young family members, including children . . . to suffer as a result of a parent's incarceration," *United States v. Brewer*, 899 F.2d 503, 508 (6th Cir.) (internal quotation marks omitted; alteration in original), *cert. denied*, 498 U.S. 844, 112 L. Ed. 2d 95, 111 S. Ct. 127 (1990), "[t]he spectre of harm to innocent family members should not be permitted to insulate a felon from the condign consequences of his criminal deportment, nor to entrammel the execution of a fair and just sentence," *United States v. DeCologero*, 821 F.2d 39, 44 (1st Cir. 1983).

In sum, we hold that the district court correctly ruled with respect to both the prisoners and the outsiders, and we affirm its judgment. That portion of the appeal directed to the denial of the preliminary injunction motion thus becomes moot.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Michelle Bazzetta, Stacy Barker, Toni Bunton, Debra King, Shante Allen, Adrienne Bronaugh, Alesia Butler, Tamara Prude, Susan Fair, Valerie Bunton and Arturo Zavala, through his Next Friend Valerie Bunton, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

No. 95-73540
Hon. Nancy G. Edmunds

Kenneth McGinnis, Director of Michigan Dep't of Corrections, Dan Bolden, Deputy Director of the Correctional Facilities, Michigan Dep't of Corrections,

Defendants.

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

This matter comes before the court on Defendants' motion to dismiss and/or for summary judgment. Plaintiffs originally brought this case challenging new Michigan prison rules restricting the visitation rights of state prisoners in state court. Defendants thereafter removed the case to federal court. Plaintiffs sought a preliminary injunction, but this court denied their motion on the basis that Plaintiffs had failed to prove a likelihood of success on the merits. Defendants now bring this motion to dismiss and/or for summary judgment.

I. Facts

Plaintiffs are a group of women prisoners and their prospective visitors protesting new Michigan Correctional Rules regarding visitation. The new rules in question are:

1. Prisoners may only receive visitors under the age of 18 who are their children, step-children or grandchildren (thus prisoners may not see minor siblings, cousins, nieces, nephews, etc.) (Rule 791.6609(2) (b));

2. Prisoners may not visit with their natural children if their parental rights have been terminated for any reason (Rule 791.6609(6) (a));

3. Prisoners may only have 10 visitors who are not "immediate family" (immediate family does not include nieces, nephews, aunts, uncles, cousins, in-laws) (Rule 791.6609(2));

4. No minor children may visit unless accompanied by an adult legal guardian with proof of legal guardianship or an immediate family member (Rule 791.6609(5));

5. Members of the public may be on only one prisoner's visitation list (not including immediate family members) thus activists cannot visit more than one prisoner (Rule 791.6609(2) (a));

6. Prisoners may be denied all visitors (except from clergymen or an attorney) upon two major misconducts involving substance abuse (Rule 791.6609(11) (d));

7. All former prisoners are excluded from visiting current prisoners who are not "immediate family."

Plaintiffs sought a preliminary injunction to enjoin enforcement of the new rules. This court denied the motion on the basis that Plaintiffs could not show a likelihood of success on the merits. Thereafter, Plaintiffs sought to certify their case as a class action, which this court granted, dividing Plaintiffs into two sub-classes: one class made up of prisoners and the other made up of non-prisoners affected by the new prison regulations. In their Second Amended Complaint, Plaintiffs contend that the rules violate their First, Eighth and Fourteenth Amendment Constitutional rights. In particular, they allege in:

> Count I: the visitation restrictions with family members violate Plaintiffs' fundamental right to integrity in family relationships in violation of the First, Ninth and Fourteenth Amendments;

Count II: the visitation restrictions prohibiting the public from visiting with more than one prisoner in the State of Michigan during any given interval of time violates both sub-classes' right to freedom of speech and association under the First Amendment;

Count III: the visitation restrictions constitute cruel and unusual punishment in violation of the Eighth Amendment;

Count IV: the visitation restrictions violate the equal protection clause of the Fourteenth Amendment;

Count V: the visitation restrictions that permanently restrict all visitation for a Plaintiff prisoner found guilty of two misconducts related to substance abuse constitute

cruel and unusual punishment in violation of the Eighth Amendment.

Defendants now seek to have the court grant their motion to dismiss and/or for summary judgment.

II. Standards of Review

A. Motion to Dismiss

A motion to dismiss under Rule 12(b) (6) tests the sufficiency of a complaint. *Elliot Co., Inc. v. Caribbean Utilities Co., Ltd.*, 513 F.2d 1176, 1182 (6th Cir. 1975). In so doing, the court 'must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief." *In re Delorean Motor Company*, 991 F.2d 1236, 1240 (6th Cir. 1993). The complaint must include direct or indirect allegations "respecting all the material elements to sustain a recovery under some viable legal theory." *Id.* (citations omitted). The motion to dismiss should not be granted "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Elliot*, 513 F.2d at 1182.

B. Standard for Summary Judgment

Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R. Civ. P. 56(c). The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). After adequate time for discovery and upon

motion, Rule 56(c) mandates summary judgment against a party who fails to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 322 (1986).

The movant has an initial burden of showing "the absence of a genuine issue of material fact." *Celotex*, 477 U.S. 317, 323. Once the movant meets this burden, the non-movant must come forward with specific facts showing that there is a genuine issue for trial. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). To demonstrate a genuine issue, the non-movant must present sufficient evidence upon which a jury could reasonably find for the non-movant; a "scintilla of evidence" is insufficient. *Liberty Lobby*, 477 U.S. at 252.

The court must believe the non-movant's evidence and draw "all justifiable inferences" in the non-movant's favor. *Liberty Lobby*, 477 U.S. at 255. The inquiry is whether the evidence presented is such that a jury applying the relevant evidentiary standard could "reasonably find for either the plaintiff or the defendant." *Liberty Lobby*, 477 U.S. at 255.

III. Analysis

As a preliminary matter, Plaintiffs contend that the evidence adduced during the preliminary injunction hearing is not suitable for this court to consider in determining a summary judgment motion. Plaintiffs cite *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) and *Wilcox v. U.S.*, 888 F.2d 1111, 1114 (6th Cir. 1989) in support of this assertion. These cases, however, stand for a different proposition. In *Camenisch*, the Supreme Court stated the general rule,

> A party thus is not required to prove his case in full at a preliminary injunction hearing . . . and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits. . . . In light of these considerations, it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits.

Camenisch, 451 U.S. at 395. This reasoning was followed by the Sixth Circuit in *Wilcox*. In that case, the district court denied the plaintiff's motion for preliminary injunction against the Internal Revenue Service. Thereafter, the district court granted the IRS' summary judgment motion on the basis that the preliminary injunction hearing was dispositive "because it was the law of the case." *Id.* at 1113. The Sixth Circuit reversed, holding that "decisions on preliminary injunctions do not constitute law of the case and parties are free to litigate the merits." *Id.* at 114 (quoting with approval *Golden State Transit Corp. v. City of Los Angeles*, 754 F.2d 830, 832 n. 2 (9th Cir. 1985) (further quotations and citations omitted). Hence, this court may not grant Defendants' summary judgment merely on the basis that Plaintiffs' preliminary injunction motion was denied because of a lack of likelihood of success on the merits. Despite Plaintiffs' assertions to the contrary, however, this court may consider testimony and evidence introduced at the preliminary injunction hearing as part of the record in determining whether a genuine issue of material fact does not exist requiring the court to grant Defendants' motion for summary judgment. The counts of Plaintiffs' Complaint will be addressed separately.

A. Count I

In Count I, Plaintiffs allege that the new visitation rules restricting visitation with family members under the age of eighteen are an unreasonable and arbitrary deprivation of the

Plaintiffs' rights to freedom of association, family integrity, privacy and due process under the First, Ninth and Fourteenth Amendments.

1. Prisoner's First Amendment Claim

Convicted prisoners generally have no absolute, unfettered constitutional right to unrestricted visitation with any person regardless of whether that person is a family member or not. *Lvnott v. Henderson*, 610 F.2d 340 (5th Cir. 1980). Rather, visitation privileges are subject to the discretion of prison officials. *McCray v. Sullivan*, 509 F.2d 1332 (5th Cir.), *cert. denied*, 423 U.S. 859 (1975). In *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), the Supreme Court stated,

The fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment, which are implicit in incarceration.... Perhaps the most obvious of the First Amendment rights that are necessarily curtailed by confinement are those associational rights that the First Amendment protects outside of prison walls. The concept of incarceration itself entails a restriction on the freedom of inmates to associate with those outside the penal institution.

433 U.S. at 125. The Sixth Circuit has yet to opine whether prisoners have a First Amendment freedom of association right to visitation. *Long v. Norris*, 929 F.2d 1111 (6th Cir.), *cert. denied*, 502 U.S. 863 (1991). ("[W]e have not decided the degree to which prison inmates retain their freedom of association. . . . Given the sparse authority on this issue, we hold that any such right, if it exists, is not clearly established." *Id.* at 1118). A survey of caselaw from other circuits leads this court to find that the greater weight of authority holds that no

First Amendment right of freedom of association exists for prisoners. *See, e.g., White v. Keller*, 438 F. Supp. 110, 115 (D. Md. 1977), *aff'd per curiam*, 588 F.2d 913 (4th Cir. 1978); *Thorne v. Jones*, 765 F.2d 1270, 1274 (5th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986). Accordingly, the Plaintiff prisoners' First Amendment claim fails to state a claim upon which relief can be granted.

2. Non-prisoners' First Amendment Claim

The First Amendment rights of the non-prisoner class are similarly restricted by the fact of the restrictions placed upon the prisoners. *See, White v. Keller*, 438 F. Supp. 110, 115 (D. Md. 1977), *aff'd per curiam*, 588 F.2d 913 (4th Cir. 1978). The court in *White* explained,

It is the further opinion of this court that the Supreme Court itself has suggested there is no general right to prison visitation for either the prisoners or the public. In *Pell v. Procunier*, . . . the Court held that prisoners have no constitutional right to visit with members of the press and that members of the press have no constitutional right to visit with selected prisoners. Although the Court's principal concern was freedom of expression --press and speech-- rather than freedom of association, the result was nonetheless that the two groups had no right to visit with each other. Implicit in the Court's opinion is that prisoners have no right to associate face-to-face with any particular member of the public, and members of the public have no right to so associate with any particular prisoner. . . . The foregoing clearly explains why this court believes there is no right among prisoners to receive visitors. The court believes that the non-existence of a right among would-be visitors to visit prisoners is a necessary corollary whose justification is apparent by resort to the *reductio ad absurdum*.

White, 438 F. Supp. at 117-119 (aff'd per curiam). *See also, Fennell v. Carlson*, 466 F. Supp. 56, 59 (W.D. Okla. 1978). Whereas First Amendment rights are implicated in the censorship of mail, prisoners and visitors have no First Amendment right to visitation because alternative means of exercising their First Amendment rights are available. The Plaintiff non-prisoners First Amendment Count therefore also fail to state a claim upon which relief can be granted.

3. Plaintiffs' Family Integrity Claim

Plaintiffs also claim that the visitation rules restricting which minor children may visit a prison violate the prisoners' Fourteenth Amendment fundamental right to family integrity. The Fourteenth Amendment prohibits a State from depriving a person of life, liberty, or property without due process of law and protects "the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) Plaintiffs are attempting to extend the reasoning of *Moore v. City of Cleveland*, 431 U.S. 494 (1977), to the current context. In *Moore*, the Supreme Court struck down the city's zoning laws which prohibited a grandmother from living with her son and her grandson. *Id.* The Court held that the concept of liberty in the Fourteenth Amendment includes the right to associate and reside with one's relatives. *Id.* The Plaintiffs here argue that the new rules impermissibly interfere with family relationships as did the zoning ordinance in *Moore*, and thus violate the Plaintiffs' liberty interest in family association.

The instant case, however, is distinguishable from *Moore*. In *Moore*, the Supreme Court was concerned with the fact that a grandmother and grandson could not live together. In this case, grandparents and parents may see their minor grandchildren and children. The Plaintiffs are seeking to extend the reasoning of *Moore* to even further extensions of the

family tree. While dicta in *Moore* discusses extended family relationships, holding for the Plaintiffs in this case would go well beyond established precedent.

Furthermore, *Moore* involved free citizens who wished to live together. That case is quite distinct from the current case where prisoners are petitioning for visitation rights. Incarceration by its very nature necessarily restricts the familial relationship in ways that would be unacceptable in free society: imprisonment deprives inmates of the freedom "to be with family and friends and to form the other enduring attachments of normal life." *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). For example, it is well established that prisoners have no right to conjugal visits. *Turner*, 482 U.S. at 95-96. The new regulations restricting the visitation of minor children do not infringe upon the Plaintiffs' fundamental right of family integrity.

Plaintiffs argue that this court "ruled only that [the right to family integrity] is limited to the parent/child/grandchild relationship" and, therefore, that Plaintiffs have stated a claim. The only regulation to which Plaintiffs could be referring is that regulation prohibiting minor children from visiting the prison unless accompanied by an immediate family member or adult legal guardian. The visitation rule may have the effect of preventing some children from visiting their parents, step-parents or grandparents because no qualified individual is available to bring the child to the prison. This circumstance does not require the court to find the rule unconstitutional. In fact, courts have held that it is constitutional to transfer prisoners from a prison near their family to one too far away for the family to visit, despite the obvious limitation on family visitation. *See e.g., Pitts v. Meese*, 684 F. Supp. 303, 312 (D.D.C. 1987), *aff'd*, *Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989). The *Pitts* court followed and extended the reasoning laid out by the Supreme Court in *Olim v.*

Wakinekona, 461 U.S. 238 (1983). In *Olim*, the Court held that a prisoner "has no justifiable expectation that he will be incarcerated in any particular prison within a State, [and] he has no justifiable expectation that he will be incarcerated in any particular State." *Id.* at 245. The court went on to instruct

> In short, it is neither unreasonable nor unusual for an inmate to serve practically his entire sentence in a State other than the one in which he was convicted and sentenced, or to be transferred to an out-of-state prison after serving a portion of his sentence in his home State. . . . Even when, as here, the transfer involves long distances and an ocean crossing, the confinement remains within constitutional limits. . . . The reasoning of *Meachum [v. Fano*, 427 U.S. 215 (1976)] and *Montayne [v. Havmes*, 427 U.S. 236 (1976)] compels the conclusion that an interstate prison transfer, including one from Hawaii to California, does not deprive an inmate of any liberty interest protected by the Due Process Clause in and of itself.

Id. at 247-48. Following this reasoning, the court in *Pitts* found that the incarceration of women prisoners in a facility far from their families did not infringe on their constitutional rights. *Pitts*, 684 F. Supp. at 312.

Similarly, in this case, prisoners may be prevented from seeing their children because no qualified adult is available to bring the children into the prison. However, as stated by the Supreme Court, the inaccessibility of a prisoner to his family "does not deprive an inmate of any liberty interest protected by the Due Process Clause in and of itself." *Id.*

Even if Plaintiffs could survive a motion to dismiss as to this claim, they cannot survive a motion for summary judgment. Any restriction on a fundamental right must be

"reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 79 (1987). In *Turner*, the Court listed four factors that courts should consider in determining whether such a prison regulation is reasonable:

1. whether a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it exists;

2. whether there are alternative ways for the prisoner to exercise the implicated constitutional right;

3. what impact would accommodation of the implicated constitutional right have on the prison administration;

4. whether the regulation is an exaggerated response to prison concerns.

Id. at 89-90.

Witnesses for the Defendants testified during the preliminary injunction hearing that their legitimate penological interests in limiting visitation of minors are: 1) preventing children from suffering physical and sexual abuse, 2) preventing children from being injured in the non-child-proofed visitation rooms, and 3) limiting the instances in which children can be used to smuggle weapons, drugs or other contraband into the prisons; and 4) reducing the volume of visits to ensure the safety of both prisoners and visitors. (*See* testimony of Warden Burke, Tr. Vol. I at 119-24, Vol. II at 8, 10-11, testimony of Warden Langley, Tr. Vol. II at 65-78; testimony of Deputy Director Bolden, Tr. Vol. II at 82-86, 100). Defendants further articulated that family members and guardians are best suited to controlling children. (*See* testimony of Director Bolden, Tr. Vol. I at 98). For example,

when asked about the penological interests sought to be served by the new regulations, Director Bolden answered,

> Well, I think our interest was to minimize the opportunity for harm or risk to come to children that come to our facilities. Our experience has also taught us that there has been less opportunity or less occurrence of a child that's the child of the person they're visiting being victimized by someone else.
>
> Most of the cases we looked at, particularly the Higgen situation, the child that was brought up there was not the child of any prisoner that she was visiting, and there seemed to be a more protective atmosphere when a child is there visiting their parent, and they seemed to keep up with that child a little more, and you don't run into the risk of some other person who may not be visiting that child, molesting that child.

(Testimony of Director Bolden, Tr. Vol. I at 98). Director Bolden further testified that he anticipated an overall decrease of ten to fifteen percent in visitation. (*Id.* at 99)

Courts have consistently held that the maintenance of prison security and prevention of contraband from entering the prison are "legitimate penological" interests. *See Turner*, 482 U.S at 92-93; *Procunier*, 416 U.S. at 413-14; *Bell v. Wolfish*, 441 U.S. 520 (1979). Having found the penological interest to be legitimate, then

> in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations[,] courts should ordinarily defer to [prison administrators'] expert judgment in such matters.

Block v. Rutherford, 468 U.S. 576, 586-89 (1984). In this case, the Plaintiffs have failed to come forward with substantial evidence that the Michigan prison officials exaggerated their response. Moreover, Defendants articulated problems associated with supervising children and their position that family members are best suited to control a child. (*See* Testimony of Director Bolden, Tr. Vol. I at 98). Having put forth a valid, legitimate interest, and in the absence of any evidence showing that officials have exaggerated their response, the court finds that Plaintiffs have failed to meet their burden to demonstrate that a genuine issue of material fact exists.

4. Plaintiffs' Ninth Amendment Claim

Plaintiffs also brought suit pursuant to the Ninth Amendment, claiming that their right to privacy has been violated by the new prison visitation regulations. Plaintiffs, however, can cite no case supporting this claim. Plaintiffs thus have failed to state a claim as a matter of law in Count I of their Second Amended Complaint. Consequently, Count I of Plaintiffs Complaint is dismissed.

B. Count II

In Count II, Plaintiffs contend that the new prison visitation regulations that restrict members of the public from visiting more than one non-immediate family member prisoner within a certain time interval is a violation of the non-prisoner's rights to freedom of association. This cause of action fails to state a claim. Once again, the rights of non-prisoners are similarly restricted by the incarceration of the prisoner.

C. Count III

In Count III, Plaintiffs allege that the new regulations constitute cruel and unusual punishment in violation of the Eighth Amendment. Eighth Amendment violations occur when prison conditions result in the "unnecessary and wanton infliction of pain," are "grossly disproportionate to the severity of the crime warranting imprisonment," or result in an "unquestioned and serious deprivation of basic human needs." *Rhodes v. Chapman*, 452 U.S. 337, 346-47 (1981). However, "to the extent that conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offense against society." *Id.* at 347. The Sixth Circuit has indicated that prohibiting visitation to prisoners does not violate the Eighth Amendment. *Bellamy v. Bradley*, 729 F.2d 416 (6th Cir. 1984). Other circuit courts of appeals have also found no Eighth Amendment violations where visitation privileges have been restricted. *See e.g., Furrow v. Magnusson*, No. 91-1585, 1992 WL 73154, *2 (1st Cir. April 10, 1992) ("Prisoner grievances involving visitation privileges and confiscation of photographs obviously are not nearly weighty enough to implicate the Eighth Amendment's ban on cruel and unusual punishment."); *Smith v. Farley*, No. 94-1046, 1995 WL 216896, *4 (7th Cir. April 4, 1995) (citing *Wilson v. Seiter*, 501 U.S. 294 (1991)) Plaintiffs, therefore, have no claim that the regulations violate the Eighth Amendment.

D. Count IV

In Count IV, Plaintiffs allege that the rules prohibiting: 1) visits from former prisoners except with immediate family members; 2) the public from visiting more than one prisoner during any given interval of time; and 3) visits from non-immediate family members under the age of eighteen years,

violate the non-prisoners' First Amendment rights and their Fourteenth Amendment right to equal protection.

1. First Amendment Claim

As to the non-prisoner plaintiffs, their rights to visit prisoners are similarly restricted by the fact of the prisoner's incarceration.

b. [sic] The Equal Protection Claim

Plaintiffs also claim that the new regulations violate their Fourteenth Amendment right to equal protection. The Supreme court has instructed,

> [U]nless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.

Nordlinger v. Hahn, 112 5. Ct. 2326, 2331-32 (1992). Here, a fundamental right is not jeopardized, and the alleged discrimination is not on the basis of an inherently suspect characteristic. Consequently, the regulations must only pass the requirements of the rational basis test. Defendants have articulated legitimate state interests: the preservation of order within the prison system by preventing contraband from entering the premises and the protection of minor children by ensuring that they are properly supervised. Furthermore, the regulations are properly tailored to rationally achieve those interests. Plaintiffs have come forward with no evidence demonstrating that the regulations will not achieve the legitimate state interests. Accordingly, Defendants' motion for summary judgment will be granted.

E. Count V

As previously noted by this court, Plaintiffs' claim that the visitation rule restricting all visitation privileges upon a prisoner's being found guilty of two major misconducts involving substance abuse violates the Eighth and Fourteenth Amendments is not ripe for decision. Plaintiffs have failed to come forward with any example of a prisoner being denied visitation rights as a result of this rule. As the Supreme Court stated, "[a] hypothetical threat is not enough." *United Public Workers v. Mitchell*, 330 U.S. 75, 89-91 (1947). Because this claim is not ripe, Plaintiffs do not have standing at this time. Accordingly, Count V of Plaintiffs' Second Amended Complaint is properly dismissed.

IV. Conclusion

For the foregoing reasons, the court hereby GRANTS Defendants' motion to dismiss and/or for summary judgment.

/s/
Nancy G. Edmunds
U.S. District Judge

Dated: Apr 09 1996

[902 F. Supp. 765]

Michelle Bazzetta, Stacy Barker, Toni Bunton, Debra King, Shante Allen, Adrienne Bronaugh, Alesia Butler, Tamara Prude, Susan Fair, Valerie Bunton and Arturo Bunton, through his Next Friend Valerie Bunton, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

Kenneth McGinnis, Director of Michigan Department of Corrections; Michigan Department of Corrections,

Defendants.

No. 95-73540

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

October 6, 1995, Decided

COUNSEL:
ATTORNEY(S) FOR PLAINTIFF(S): Michael J. Barnhart, Detroit, MI.

ATTORNEY(S) FOR DEFENDANT(S): George N. Stevenson, Lansing, MI.

JUDGES:
Nancy G. Edmunds, U.S. District Judge

OPINION BY:
Nancy G. Edmunds

OPINION:

MEMORANDUM OPINION AND ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

This matter comes before the court on Plaintiffs' motion for preliminary injunction to prevent enforcement of certain Michigan prison regulations restricting prisoner's visitation rights. For the following reasons, Plaintiffs motion for preliminary injunction is denied.

I. Facts

Plaintiffs are a group of women prisoners and their prospective visitors protesting new Michigan Correctional Rules regarding visitation. The new rules in question are:

1. Prisoners may only receive visitors under the age of 18 who are their children, step-children or grandchildren (thus prisoners may not see minor siblings, cousins, nieces, nephews, etc.) (Rule 791.6609(2)(b));

2. Prisoners may not visit with their natural children if their parental rights have been terminated for any reason (Rule 791.6609(6)(a))

3. Prisoners may only have 10 visitors who are not "immediate family" (immediate family does not

include nieces, nephews, aunts, uncles, cousins, in-laws) (Rule 791.6609(2));

4. No minor children may visit unless accompanied by an adult legal guardian with proof of legal guardianship or an immediate family member (Rule 791.6609(5));

5. Members of the public may be on only one prisoner's visitation list (not including immediate family members) thus activists cannot visit more than one prisoner (Rule 791.6609(2)(a));

6. Prisoners may be denied all visitors (except from clergymen or an attorney) upon two major misconducts involving substance abuse (Rule 791.6609(11)(d));

7. All former prisoners are excluded from visiting current prisoners who are not "immediate family."

Plaintiffs contend that the above rules violate their First, Eighth and Fourteenth Amendment Constitutional rights, and brought suit in Michigan State Court pursuant to 42 U.S.C. § 1983. The rules were scheduled to go into effect on October 2, 1995, so Plaintiffs brought a motion for a temporary restraining order and preliminary injunction to enjoin enforcement of the new rules. The Defendants removed the action to this court under the authority of 28 U.S.C. §§ 1441(a) and 1446. The court entered a temporary restraining order enjoining enforcement of the rules until a preliminary injunction hearing could be held.

II. Standard for Preliminary Injunction

The availability of injunctive relief is a procedural question that is governed by federal law. *Southern Milk Sales, Inc. v. Martin*, 924 F.2d 98 (6th Cir. 1991). The Sixth Circuit has held that a court must consider four factors in deciding whether to issue a preliminary injunction:

1. whether the movant has shown a strong or substantial likelihood of success on the merits;

2. whether the movant has demonstrated irreparable injury;

3. whether the issuance of a preliminary injunction would cause substantial harm to others; and

4. whether the public interest is served by the issuance of an injunction.

Parker v. U.S. Dept. of Agric., 879 F.2d 1362, 1367 (6th Cir. 1989). The foregoing factors should balanced. *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985). Where the three factors other than the likelihood of success all strongly favor issuing the injunction, a district court is within its discretion in issuing a preliminary injunction if the merits present a sufficiently serious question to justify a further investigation. *Id.* at 1230. Alternatively, the court may also issue a preliminary injunction if the movant "at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if an injunction is issued." *Frisch's Restaurant, Inc. v. Shoney's Inc.*, 759 F.2d 1261, 1270 (6th Cir. 1985) (citations omitted).

III. Analysis

A. Likelihood of Success on the Merits

To prevail in a civil rights action under 42 U.S.C. § 1983, a plaintiff must plead and prove that the defendants, acting under color of state law, deprived the plaintiff of a right secured by the Constitution and laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981), *overruled on other grounds*, *Daniels v. Williams*, 474 U.S. 327, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986). Section 1983 alone creates no substantive rights; rather, it is a vehicle by which a plaintiff may seek redress for deprivations of rights established in the Constitution or federal laws. *Baker v. McCollan*, 443 U.S. 137, 144 n.3, 61 L. Ed. 2d 433, 99 S. Ct. 2689 (1979). The statute applies only if there is a deprivation of a federal right. See e.g., *Paul v. Davis*, 424 U.S. 693, 699-701, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976); *Baker*, 443 U.S. at 146-47. Thus, "the first inquiry in any § 1983 suit . . . is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws'" of the United States. *Baker*, 443 U.S. at 140, 99 S. Ct. at 2692.

The Plaintiff prisoners claim that the new prisoner visitation rules will deprive them of rights under the First, Eighth and Fourteenth Amendments to the United States Constitution. Prison regulations that implicate a prisoner's constitutional rights will be upheld when "it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987). The non-prisoner Plaintiffs claim that the new rules will deprive them of rights under the First and Fourteenth Amendments. Prison regulations must respect the constitutional rights of non-prisoners and are subject to that level of scrutiny determined by the Supreme Court for the particular constitutional violations in question. Cf. *Procunier v. Martinez*, 416 U.S. 396, 40 L.

Ed. 2d 224, 94 S. Ct. 1800 (1974) (Court applied strict scrutiny analysis to infringement of non-inmate's First Amendment rights).

1. Are the Constitutional Rights of the Plaintiff Prisoners Implicated by the New Regulations?

a. Rules restricting visitation of minor children and the overall number of visitors

Plaintiffs first claim that the regulations restricting visitation of minor children and the overall number of visitors a prisoner may see to ten, violate their constitutional right of freedom of association. Convicted prisoners, however, have no absolute, unfettered constitutional right to unrestricted visitation with any person, regardless of whether that person is a family member or not. *Bellamy v. Bradley,* 729 F.2d 416, 420 (6th Cir.), *cert. denied*, 469 U.S. 845, 83 L. Ed. 2d 93, 105 S. Ct. 156 (1984); *Lynott v. Henderson,* 610 F.2d 340 (5th Cir. 1980). Rather, visitation privileges are subject to the discretion of prison officials. *McCray v. Sullivan,* 509 F.2d 1332 (5th Cir.), *cert denied*, 423 U.S. 859, 46 L. Ed. 2d 86, 96 S. Ct. 114 (1975). In *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 53 L. Ed. 2d 629, 97 S. Ct. 2532 (1977), the Supreme Court stated,

> The fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment, which are implicit in incarceration . . . . Perhaps the most obvious of the First Amendment rights that are necessarily curtailed by confinement are those associational rights that the First Amendment protects outside of prison walls. The concept of incarceration itself entails a restriction on the freedom of inmates to associate with those outside the penal institution.

433 U.S. at 125-25. The Sixth Circuit has yet to opine whether prisoners have a First Amendment freedom of association right to visitation. *Long v. Norris,* 929 F.2d 1111 (6th Cir.), *cert. denied*, 502 U.S. 863, 112 S. Ct. 187, 116 L. Ed. 2d 148 (1991) ("We have not decided the degree to which prison inmates retain their freedom of association. . . . Given the sparse authority on this issue, we hold that any such right, if it exists, is not clearly established." *Id.* at 1118). Other Circuit courts have held that no First Amendment right to visitation exists. *White v. Keller,* 438 F. Supp. 110, 115 (D. Md. 1977), *aff'd per curiam*, 588 F.2d 913 (4th Cir. 1978) (finding that prisoner visitation occurs for social rather than ideological purposes and further that "visitation does not seem to be a right, but merely one means of effecting a wholly distinct right." *Id.* at 117); *Thorne v. Jones,* 765 F.2d 1270, 1274 (5th Cir. 1985), *cert. denied*, 475 U.S. 1016, 89 L. Ed. 2d 313, 106 S. Ct. 1198, 106 S. Ct. 1199 (1986) (finding no First Amendment right of freedom of association for prisoners to have physical association). Courts have further held that constitutional challenges asserting a right to visitation fail even to state a claim. *McCray,* 509 F.2d at 1334. Moreover, courts in this district have previously held that prisoner's constitutional rights are not implicated by the restriction of visitation. *O'Bryan v. County of Saginaw, Mich. (O'Bryan III),* 529 F. Supp. 206, 211 (E.D. Mich. 1981); *Mawby v. Ambroyer,* 568 F. Supp. 245, 249 (E.D. Mich. 1983).

This court is aware that other courts have come to a different conclusion. See e.g., *Laaman v. Helgemoe,* 437 F. Supp. 269, 320 (1977) (and cases cited therein); *Nicholson v. Choctaw County,* 498 F. Supp. 295, 310 (S.D. Ala. 1980). Yet the stronger reasoning and weight of authority lead this court to find that no First Amendment right of freedom of association exists for prisoners.

Plaintiffs next argue that the visitation rules restricting which minor children may visit a prison violate their Fourteenth Amendment fundamental right to family integrity. The Fourteenth Amendment prohibits a State from depriving a person of life, liberty, or property without due process of law and protects "the individual against arbitrary action of government." *Wolff v. McDonnell,* 418 U.S. 539, 558, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974). Plaintiffs are attempting to extend the analysis and reasoning of *Moore v. City of East Cleveland,* 431 U.S. 494, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977) (plurality opinion), to the current context.

In *Moore*, the Court struck down the city's zoning laws which prohibited a grandmother from living with her son and her grandson. *Id.* The Court held that the concept of liberty in the Fourteenth Amendment includes the right to associate and reside with one's relatives. *Id.* The Plaintiffs here argue that the new rules impermissibly interfere with family relationships as did the zoning ordinance in *Moore*, and thus violate the Plaintiffs' liberty interest in family association.

Plaintiffs' argument is unavailing. The Supreme Court in *Moore* was concerned with the fact that a grandmother and grandson could not live together. In this case, grandparents and parents may see their minor grandchildren and children. The Plaintiffs are seeking to extend the reasoning of *Moore* to even further extensions of the family tree. While dicta in *Moore* discusses extended family relationships, holding for the Plaintiffs in this case would go well beyond established precedent. Furthermore, *Moore* involved free citizens who wished to live together. That case is quite factually distinct from the current case where prisoners are petitioning for visitation rights. Incarceration by its very nature necessarily restricts the familial relationship in ways that would be unacceptable in free society: imprisonment deprives inmates of the freedom "to be with family and friends and to form the

other enduring attachments of normal life." *Morrissey v. Brewer,* 408 U.S. 471, 482, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972). For example, it is well established that prisoners have no right to conjugal visits. *Turner,* 482 U.S. at 95-96. The new regulations do not infringe upon the Plaintiffs' fundamental right of family integrity.

The Plaintiffs also contend that the rules restricting visitation are cruel and unusual punishment in violation of the Eighth Amendment. Eighth Amendment violations occur when prison conditions result in the "unnecessary and wanton infliction of pain," are "grossly disproportionate to the severity of the crime warranting imprisonment," or result in an "unquestioned and serious deprivation of basic human needs." *Rhodes v. Chapman,* 452 U.S. 337, 346-47, 69 L. Ed. 2d 59, 101 S. Ct. 2392 (1981). However, "to the extent that conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offense against society." *Id.* at 347. The Sixth Circuit has indicated that prohibiting visitation to prisoners does not violate the Eighth Amendment. *Bellamy v. Bradley,* 729 F.2d 416 (6th Cir. 1984). Plaintiffs, therefore, have no claim that the regulations violate the Eighth Amendment.

b. Rule prohibiting prisoners from visiting with their natural children if their parental rights have been terminated for any reason.

Parents who terminate their parental rights lose all constitutional rights in regard to those children upon entrance of the termination order. See *Davis v. Thornburgh,* 903 F.2d 212, 220 (3d Cir. 1990). Thus, the children are treated as non-family members. Once again, prisoners have no absolute constitutional right to visitation with strangers, and thus this rule does not violate any of the prisoners' rights.

c. Rule prohibiting minor children from visiting the prison unless accompanied by an immediate family member or adult legal guardian with proof of legal guardianship.chat right must be "reasonably related to legitimate penological interests." *Turner v. Safley,* 482 U.S. 78, 89, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987). In *Turner*, the Court listed four factors that courts should consider in determining whether such a prison regulation is reasonable:

1. whether a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it exists;

2. whether there are alternative ways for the prisoner to exercise the implicated constitutional right;

3. what impact would accommodation of the implicated constitutional right have on the prison administration;

4. whether the regulation is an exaggerated response to prison concerns.

Id. at 89-90, 107 S. Ct. at 2261-62.

The Defendants stated in their brief and during the preliminary injunction hearing, that their legitimate penological interests are: 1) preventing children from suffering physical and sexual abuse, 2) preventing children from being injured in the non-child-proofed visitation rooms, and 3) limiting the instances in which children can be used to smuggle weapons, drugs or other contraband into the prisons. Defendants further articulated that family members and guardians are best suited to controlling children.

Courts have consistently held that the maintenance of prison security and prevention of contraband from entering the prison are "legitimate penological" interests. See *Turner,* 482 U.S. at 92-93; *Procunier,* 416 U.S. at 413-14; *Bell v. Wolfish,* 441 U.S. 520, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979). Having found the penological interest to be legitimate, then in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations[,] courts should ordinarily defer to [prison administrators'] expert judgment in such matters.

Block v. Rutherford, 468 U.S. 576, 586-89, 82 L. Ed. 2d 438, 104 S. Ct. 3227 (1984). In this case, the Plaintiffs have failed to come forward with substantial evidence that the Michigan prison officials exaggerated their response. Moreover, Defendants articulated problems associated with supervising children and their position that family members are best suited to control a child. Having put forth a valid, legitimate interest, and in the absence of any evidence showing that officials have exaggerated their response, the court finds no constitutional violation.

d. Rules restricting members of the public to being on only one prisoner's visitation list at a time and prohibiting former prisoners from visiting prisoners other than immediate family

As to the non-prisoner plaintiffs, their rights to visit prisoners are similarly restricted by the fact of the prisoner's incarceration. The court in *White* explained,

> It is the further opinion of this court that the Supreme Court itself has suggested there is no general right to prison visitation for either the prisoners or the public. In *Pell v. Procunier*, . . . the Court held that prisoners have no constitutional right to visit with members of

> the press and that members of the press have no constitutional right to visit with selected prisoners. Although the Court's principal concern was freedom of expression --press and speech-- rather than freedom of association, the result was nonetheless that the two groups had no right to visit with each other. Implicit in the Court's opinion is that prisoners have no right to associate face-to-face with any particular member of the public, and members of the public have no right to so associate with any particular prisoner. . . . The foregoing clearly explains why this court believes there is no right among prisoners to receive visitors. The court believes that the non-existence of a right among would-be visitors to visit prisoners is a necessary corollary whose justification is apparent by resort to the *reductio ad absurdum*.

White, 438 F. Supp. at 117-119 (aff'd per curiam). *See also*, *Fennell v. Carlson*, 466 F. Supp. 56, 59 (W.D. Okla. 1978).

Plaintiffs cite *Procunier v. Martinez* for the proposition that this rule should be evaluated under the higher strict scrutiny standard because the rights of non-prisoners are implicated.. That case did not hold that all cases implicating the rights of non-prisoners should be evaluated under strict scrutiny, rather, it held that prison regulations censoring a non-prisoner's mail restricted the non-prisoner's First Amendment rights, and as such had to be evaluated under the strict scrutiny standard. Courts have consistently distinguished between the rights of prisoners to communicate by way of mail and the ability of prisoners to receive visitors. Whereas First Amendment rights are implicated in the censorship of mail, prisoners and visitors have no First Amendment right to visitation because alternative means of exercising their First Amendment rights are available. Hence, no constitutional right is implicated by this rule.

e. Rule permitting prison officials to permanently deny all visitation privileges upon two major misconducts involving substance abuse

This rule is discretionary, and at this time, Plaintiffs cannot demonstrate that any person of their class will be permanently deprived of all visitation upon two major misconducts involving substance abuse. Thus, this claim is not ripe for the court to adjudicate.

B. Irreparable Injury, Balance of Harms and Public Interest

Even assuming that the court would find that the Plaintiffs have met their burden as to these factors, since the Plaintiffs cannot show that a "serious question" as to the merits exists, this court cannot find in their favor.

IV. The Eleventh Amendment

As a final matter, the Defendants contend that the Plaintiffs' have effectively sued the State of Michigan, and thus, this lawsuit is barred by the Eleventh Amendment. The Eleventh Amendment bars suits against a State or its agencies unless the State waives its immunity or Congress specifically abrogates the State's immunity. Claims for injunctive and declaratory relief made against state officials in their official capacity, such as those made in this case, however, are not barred by the Eleventh Amendment. *Doe v. Wigginton*, 21 F.3d 733, 737 (6th Cir. 1994) (citing *Edelman v. Jordan*, 415 U.S. 651, 688, 39 L. Ed. 2d 662, 94 S. Ct. 1347; *Ex Parte Young*, 209 U.S. 123, 159-60, 52 L. Ed. 714, 28 S. Ct. 441).

V. Conclusion

Being fully advised on the merits and the pleadings, for the foregoing reasons, the court hereby **DENIES** Plaintiffs' motion for preliminary injunction.

/s/
Nancy G. Edmunds
U.S. District Judge

Dated: Oct 06 1995

R 791.6609

R 791.6609 Limits on visitation.

Rule 609. (1) Except as otherwise provided in this rule, any person who is not subject to a current visitor restriction pursuant to the provisions of R 791.6611 may visit a prisoner if all of the following provisions are complied with:

(a) The person presents valid and adequate proof of identification.

(b) The person is on the prisoners list of approved visitors, as provided in subrule (2) of this rule.

(c) The visit is within the allowable quota established by the department.

(d) The visit does not constitute a threat to the prisoner's physical or mental well-being.

(e) The visit does not constitute a threat to public safety or to the order and security of the institution.

(f) Allowing the visit is not harmful to the prisoner's rehabilitation.

(g) The purpose of the visit is not to commit an illegal act.

(2) Except as provided in R 791.6607(2) and subrule (3) of this rule, a person may visit a prisoner only if he or she is on the list of approved visitors for that prisoner, which shall consist of the prisoner's immediate family members and not more than 10 other persons. The approved visitors list shall be subject to all of the following restrictions:

(a) A person may be on the approved visitors list of any prisoner to whom she or he is related as an immediate family member, but shall be on the list of only 1 prisoner at a time to whom she or he is not related as an immediate family member.

(b) A person on an approved visitor list shall be not less than 18 years of age, unless he or she is the child, stepchild, or grandchild of the prisoner or an emancipated minor who can show proof of emancipation.

(c) If the person is claimed to be an immediate family member, the prisoner shall present adequate proof of the relationship, as determined by the warden or his or her designee.

(d) A prisoner may add or delete names of immediate family members from his or her approved visitors list at any time, but shall be allowed to add or delete other names only once every 6 months.

(e) A person shall be removed from a prisoner's approved visitors list upon written request by the listed person.

(f) A warden may deny placement of anyone on a prisoner's approved visitors list for reasons of safety or security of the institution, protection of the public, previous violations of visiting room rules by the person, or for other cause as determined by the warden. A denial of placement on the list may be appealed through the prisoner grievance process.

(3) The warden may allow a single visit between a prisoner and a person who is not on the approved visitors list of the prisoner if the warden determines the visit is in the best interest of the prisoner and is not a threat to the good order and security of the facility.

(4) Each institution shall prescribe and display reasonable rules of conduct for visits to preserve public safety and institutional security and order and to prevent conduct that may be offensive to others who may be present. If a prisoner or visitor violates the provisions of this subrule, then the visit may be terminated and the prisoner and visitor may be subject to sanctions up to and including a permanent restriction of all visits or restriction to noncontact visiting only.

(5) Subject to the restrictions in subrule (6) of this rule, a child who is under the age of 18 may visit a prisoner only if the child is on the prisoner's approved visitors list and is accompanied by an adult immediate family member or a legal guardian. unless the individual is an emancipated minor.

(6) A child who is under the age of 18 shall not be permitted to visit if any of the following provisions apply:

(a) The parental rights of the prisoner to the child have been terminated.

(b) There is a court order prohibiting visits between the child and the prisoner.

(c) The prisoner has been convicted of child abuse, criminal sexual conduct, or any other assaultive or violent behavior against the child or a sibling of the child, unless specific approval for the visit has been granted by the director.

(7) Except as provided in subrule (8) of this rule, a prisoner, a former prisoner, a probationer, or a parolee shall not be allowed to visit with a prisoner unless the person is on the prisoner's approved visitors list and all of the following criteria are met:

(a) The person is an immediate family member of the prisoner.

(b) Prior approval for the visit is obtained from the warden of the institution where the visit will occur.

(c) In the case of a probationer or parolee, prior approval for the visit is obtained from the warden of the institution and the supervising field agent.

(8) A former prisoner shall be allowed to visit if she or he is one of the individuals identified in R 791.6607(2).

(9) For purposes of this rule, "immediate family member" means any of the following persons:

(a) Grandparent.
(b) Parent.
(c) Stepparent.
(d) Spouse.
(e) Mother-in-law or father-in-law.
(f) Child.
(g) Stepchild.
(h) Grandchild.
(i) Sibling.
(j) Stepbrother or stepsister.

(k) Aunts and uncles if verification is provided that they served as surrogate parents.

(10)A prisoner who is hospitalized may receive visitors only if he or she is critically ill, as verified by the attending physician, and prior approval is granted by the warden or deputy warden.

(11)The director may permanently restrict all visitation privileges, except with an attorney or member of the clergy, for a prisoner who is convicted or found guilty of any of the following:

(a) A felony or misdemeanor that occurs during a visit.

(b) A major misconduct violation, as defined in R 791.5501, that occurs during a visit or is associated with a visit.

(c) An escape, attempted escape, or conspiracy to escape.

(d) Two or more violations of the major misconduct charge of substance abuse.

(12) The director may grant reconsideration and removal of a permanent visitor restriction of all visitation privileges that is imposed pursuant to subrule (11) of this rule.

(13) Nothing in this rule creates an enforceable right of the prisoner to receive a visit or of a visitor to visit a prisoner.

(Eff. Nov. 30, 1977; amended Eff. Oct. 29, 1993; Emerg. Rule Eff. Aug. 29, 1994; amended Eff. Aug. 25, 1995.)

DIRECTOR'S OFFICE MEMORANDUM 1995-58

Effective Date: See Below

TO: Executive Policy Team
Administrative Management Team
Wardens

FROM: Kenneth L. McGinnis, Director

SUBJECT: Prisoner Visiting - Approved Visitors List, Visitor Restrictions, and Denial of all Visits

Amendments to the Department's administrative rules regarding visiting have been filed with the Secretary of State and will be effective August 25, 1995. Based on the amended rules, PD 05.03.140, Prisoner Visiting is modified as set forth in this DOM.

One of the primary changes is that, with exceptions as set forth below, prisoner visiting will be limited to those who are on a prisoners approved visitors list. Several steps will be necessary in order to fully implement this change. Thus, use of the approved visitors list as a basis for visits shall not be effective until October 2, 1995.

There are also several other new requirements in the administrative rules. These changes, which are more fully explained below, will be effective August *25,* 1995. They are:

(1) Visitors under the age of 18 must be the child, stepchild, or grandchild of the prisoner, unless the person is an emancipated minor, as defined in Paragraph F of PD 05.03.140.

(2) A permanent visitor restriction may be imposed for misdemeanors and for smuggling any item into an institution.

(3) Non-contact visits shall be imposed for 30 days if a prisoner is found guilty of a major misconduct violation of substance abuse.

Finally, the new administrative rules contain provisions similar to those in the emergency rule which allows the Director to deny all visiting privileges for certain prisoners. Since this is provided for currently in emergency rule, it is effective immediately. The process for such denials is explained below.

APPROVED VISITORS LIST

The Department will be implementing a computerized approved visitors list which shall be used at all Correctional Facilities Administration (CFA) facilities. In order to be allowed to visit a prisoner, a person must be on the prisoner's approved visitors list, with exceptions as set forth below. The following steps must be taken to implement this change in prisoner visiting.

1. Effective August 17, 1995, copies of the Visiting Application form (CAJ-103) shall be placed at the Front Desk for visitors to pick up. The forms also shall be available in each of the housing units for prisoners to send out to those who they wish to have placed on their approved visitors list.

2. The attached Notice shall be placed in the lobby, at the front desk, in the visiting room, and in all housing units immediately to inform prisoners and visitors of this change and to advise them that the CAJ-103, with the "Visitor" portion completed, must be submitted to the

facility by September 11, 1995 or that person will not be permitted to visit as of October 2, 1995. Wardens also shall discuss these changes with their Warden's Forum as soon as possible.

3. Prisoners shall be notified that they are required to submit a list of visitors they wish to have placed on their approved visitors list to their Resident Unit Manager (RUM) no later than September 11, 1995, using the Visitor List form (CAJ-334) which shall be available in each housing unit. A visitor shall not be placed on a prisoner's list unless the prisoner has requested placement of that person on the list, using the CAJ-334, and a completed CAJ-103 has been received and approved for that visitor.

4. CFA, in conjunction with Management Information Services (MIS), shall issue instructions for entry of data involving visitors and use of the data from the visitor tracking system. The names of all approved visitors who have submitted a CAJ-103 by September 11, 1995, shall be entered on the visitor tracking system by October 1, 1995.

The following persons are <u>not</u> required to be on a prisoner's approved visitors list in order to visit, unless the person is related to the prisoner by blood or marriage, and visits by these persons shall not be counted toward a prisoner's visiting quota.

1 A qualified member of the clergy of the prisoner's designated religion or clergy that the prisoner specifically requests to see.

2. An approved volunteer in an outreach program that is sponsored by an approved external religious organization.

(NOTE: Implementation of this matter will be covered more completely in a subsequent DOM.)

3. An attorney on official business or a legal paraprofessional or law clerk who is acting as an aide to counsel for the prisoner. (NOTE: This applies to all attorneys, not just a prisoner's "attorney of record". A legal paraprofessional or law clerk must have written verification from an attorney that s/he is appearing on behalf of the attorney.)

4. An official representative of the legislative, judicial, or executive branch of government, which includes staff from the Office of the Legislative Corrections Ombudsman.

If any of the above persons are related to the prisoner by blood or marriage, s/he must submit a CAJ-103 to request approval to be placed on the prisoner's approved visitors list in order to be allowed to visit and the visit shall count as one of the prisoner's regular visits.

STANDARDS FOR PLACEMENT ON AN APPROVED VISITORS LIST

Placement on an approved visitors list shall be subject to all of the following:

(1) Immediate Family Member

A prisoner may request that any of his or her immediate family members be placed on his/her list. An immediate family member is defined as a grandparent; parent; stepparent; spouse; mother- or father-in-law; child; stepchild; grandchild; sibling; stepbrother; stepsister; or aunts and uncles, if verification is provided that they

served as surrogate parents. However, those under the age of 18 who are immediate family members shall meet the requirements of number (3), below.

(2) Non-immediate Family Member

In addition to immediate family members, a prisoner may have up to ten (10) other persons on his or her approved visitors list. A person shall be on the list of only one prisoner at a time to whom he or she is not related as an immediate family member.

(3) Children

A person under the age of 18 may be placed on a prisoner's approved visitors list only if s/he is an emancipated minor or is the child, stepchild, or grandchild of the prisoner, except that in the following circumstances, placement of the child on the list shall not be approved:

(a) The parental rights of the prisoner to the child have been terminated.

(b) There is a court order prohibiting visits between the child and the prisoner.

(c) The prisoner has been convicted of child abuse, criminal sexual conduct, or any other assaultive or violent behavior against the child or a sibling of the child. The Director may grant approval for visits in such cases based upon a written request setting forth the reasons why it is believed that an exception is warranted.

(4) Prisoners. Former Prisoners. Probationers and Parolees

A prisoner, former prisoner, probationer or a parolee shall not be placed on a prisoner's approved visitors list unless all of the following criteria are met:

(a) The person is an immediate family member of the prisoner;

(b) Prior approval is obtained from the warden;

(c) If the person is a probationer or parolee, prior approval also must be obtained from the supervising field agent.

(5) Denial by the Warden

A warden may deny placement of anyone on a prisoner's approved visitors list, including an immediate family member, for any of the following reasons:

(a) Safety or security of the institution;

(b) Protection of the public;

(c) Previous violations of visiting room rules by the person;

(d) Other good cause.

APPLICATION PROCESSING

Anyone who wishes to be on a prisoner's approved visitors list must submit a completed CAJ-103 to the institution. All applications received at the institution shall be given to the appropriate RUM for processing. The RUM shall ensure that

the person requesting placement on a prisoner's list has been listed by the prisoner on the CAJ-334 as a person s/he would like to have visit. Applications shall be processed and approved or denied based on the standards in this DOM. If a person is identified as an immediate family member, staff shall attempt to confirm the relationship by reviewing the prisoner's file. If there is no proof to substantiate the relationship, the prisoner shall be required to provide documentation of the relationship. Names of approved visitors shall be placed on the visitor tracking system.

Both the prisoner and the visitor shall be provided with a copy of the CAJ-103 with the approval or denial information completed. If the denial is for the reason stated above in (5) (d), a copy of the denial shall be sent to the appropriate Regional Prison Administrator. The prisoner may appeal a denial through the prisoner grievance process. The visitor may submit a request for reconsideration to the warden.

The names of all approved visitors who have submitted a CAJ-103 by September 11, 1995, shall be entered on the visitor tracking system by October 1, 1995. Applications for placement on a prisoner's approved visitors list which are received after September 11, 1995, but prior to October 2, 1995, shall be processed as soon as possible after all applications received by September 11, 1995 have been entered. All such applications shall be processed, and approved names put on the approved visitors list, no later than October 13, 1995.

After October 1, 1995, prisoners who have not previously submitted a requested approved visitors list may submit a list (CAJ-334) at any time. Prisoners who have an approved visitors list may add or delete names of immediate family members from their list at any time. However, a prisoner shall

be allowed to add or delete names of non-immediate family members no more frequently than once every six months.

A prisoner who wishes to add or delete anyone from his or her list shall submit a request to the RUM using the CAJ-334. If the prisoner is requesting an addition to his/her list, the prisoner also shall ensure that the proposed visitor submits a completed CAJ-103. Applications for placement on the approved visitors list which are received on and or after October 2, 1995 shall be processed, including placement of approved names on the approved visitors list, within 10 business days of receipt of the completed CAJ-103.

A person who has been placed on a prisoner's approved visitors list shall be removed if that person has submitted a written request for removal to the institution. The person shall be removed from the list within three business days of receipt of the request for removal. The prisoner and the visitor shall be notified in writing that the visitor was removed at the visitor's request.

ONE-TIME EXCEPTION TO APPROVED VISITORS LIST

The warden or acting warden may make a one-time exception to the requirement that a person be on a prisoner's approved visitors list and allow a visit for someone not on the list if it is determined that the visit would be in the prisoner's best interest and would not be a threat to the order and security of the facility.

MANUAL IMPLEMENTATION OF APPROVED VISITORS LIST

Implementation of the approved visitors list is based on the computerized visitor tracking system. However, there are a few Camps which do not yet have this system. In addition, it is

essential that disruption of prisoner visiting due to computer problems is minimized as much as possible at all facilities. Thus, each institution shall ensure that a backup system is established by October 2, 1995 which provides for continuation of prisoner visiting, using the approved visitors list, during periods when the computer system is not operating.

HOSPITAL VISITS

A prisoner who is housed in an institution infirmary, Duane Waters Hospital, or an outside hospital may receive visitors from his/her approved visitors list only if s/he is critically ill, as verified by the attending physician, and prior approval is granted by the warden or deputy warden, except that Level I prisoners may receive visitors as set forth in PD 05.03.140, Paragraph N.

PERMANENT VISITOR RESTRICTIONS

The following additions have been made to those activities which may result in a permanent visitor restriction (changes are in bold):

1. The visitor smuggles, attempts to smuggle, or conspires to smuggle **any item** into or out of the facility; or

2. The visitor has a pending felony or **misdemeanor** charge or has been found guilty of a felony or **misdemeanor** that occurred in connection with a visit.

A visitor who engages in these activities shall be issued a Notice of Proposed Visitor Restriction (CAJ-315A) and a hearing shall be conducted, as set forth in PD 05.03.140.

DENIAL OF ALL VISITING PRIVILEGES

The Director may deny all visiting privileges, except with an attorney or member of the clergy, for a prisoner who is convicted or found guilty of any of the following:

1. A felony or misdemeanor that occurs during a visit;

2. A major misconduct violation that occurs during a visit or is associated with a visit.

3. An escape, attempted escape, or conspiracy to escape, whether or not associated with a visit.

4. Two or more violations of the major misconduct charge of substance abuse, whether or not associated with a visit.

A warden may submit a request for denial of all visits to the appropriate Regional Prison Administrator when it is believed that any of the above criteria have been met. The request shall be accompanied by supporting documentation. If the RPA concurs with the warden's recommendation, the request shall be submitted to the Deputy Director of CFA. If the Deputy Director concurs with the recommendation, the request shall be submitted to the Director. If the Director approves a permanent denial of all visits, the warden shall ensure that the prisoner is notified.

The Director may grant reconsideration and removal of a denial of all visitation if requested by the prisoner or the warden.

NON-CONTACT VISITING

In addition to the reasons currently set forth in PD 05.03.140 for which non-contact visits may be imposed, a prisoner who is

found guilty of a major misconduct violation of substance abuse shall be placed on non-contact visits for 30 days, except that the prisoner shall be allowed a contact visit with his or her attorney if requested by the attorney, and with staff of the Office the Legislative Corrections Ombudsman. The substance abuse violation need not be connected with a visit.

These changes will be incorporated into PD 05.03.140, Prisoner Visiting when it is next revised.

/s/
Kenneth L. McGinnis, Director